OVERSIGHT OF INDIAN CLAIMS AFFECTED BY FEDERAL STATUTE OF LIMITATIONS

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

OVERSIGHT OF INDIAN CLAIMS AFFECTED BY THE
FEDERAL STATUTE OF LIMITATIONS

APRIL 1, 1982

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OVERSIGHT OF INDIAN CLAIMS AFFECTED BY FEDERAL STATUTE OF LIMITATIONS

APRIL 1, 1982

U.S. Senate,
Select Committee on Indian Affairs,
Washington, D.C.

The committee met, pursuant to notice, at 9:38 a.m., in room 6226, Dirksen Senate Office Building, Senator William S. Cohen (chairman of the committee) presiding.

Present: Senator Cohen.

Staff present: Timothy C. Woodcock, staff director; Peter S. Taylor, general counsel; Virginia Boylan, staff attorney; Max Richtman, minority staff director; and Elva Arquero, clerk.

Senator Cohen. The meeting of the Select Committee on Indian Affairs is called to order.

Today's hearing concerns the status of efforts to identify and resolve those claims of Indian tribes that are covered by the statute of limitations.

Before inviting any testimony from the witnesses, I would like to take a moment to trace the background involving these cases and this issue.

The statute of limitations was enacted in 1966 and bars the United States from bringing actions on behalf of Indian tribes for suits sounding in tort or contract after a statutory time limit.

In 1972, the statute of limitations was about to expire and Congress extended it. The new date that was set by Congress was July 18, 1977. As that date approached, little progress had been made in identifying the claims and Congress once again extended it. This time, the expiration date was set for April 1, 1980. As that date approached, it once again became clear that the vast majority of the claims were unresolved and Congress, for a third time, extended the statute. This latest extension is due to expire on December 31, 1982.

I oppose the general extension of the statute of limitations that Congress adopted in 1980, and my experience with the statute has led me to believe that a further extension would find few claims resolved in a multiplicity of cases uncovered. I believe that even those who supported the extension share something of my frustration, and, accordingly, a proviso was added to the extension to the effect the Secretary of Interior should, after consultation with the Attorney General, submit to Congress legislative solutions to those claims covered by the statute which, in the opinion of either official, were not appropriate subjects for resolution through litigation. The final date by which those solutions were to be submitted was June 30, 1981.

Moreover, unlike the statute of limitations itself, no extension of this deadline was ever provided by Congress and yet, as we sit here even today, not one proposal for the legislative resolution of these claims has been submitted to Congress by the executive branch agencies.

In an effort to determine the status of the administration's efforts to comply with the law, I wrote two letters to the Interior Department. I received a reply to my first letter on October 9 of last year. I was advised that legislative solutions would be submitted by mid-November.

I wrote, again in December, when no proposals were forthcoming, and I received a reply exactly 2 weeks ago. In that reply the administration informed me that it intended to seek legislative resolution of only one of a large category of claims and the rest would be left unresolved.

Without objection, I will place a copy of those letters in the record at this point.

[The complete exchange of correspondence follows:]

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Washington, D.C., September 3, 1981.

Hon. JAMES G. WATT
Secretary, Department of the Interior,
Washington, D.C.

DEAR MR. SECRETARY: The fair and timely resolution of Indian claims is of primary concern to Congress and to the Members of the Senate Select Committee on Indian Affairs in particular. As you know, the participation of the United States in Indian claims for money damages which sound in either tort or contract is governed by the statute of limitations set forth at 28 U.S.C. § 2415.

In the last session of the 96th Congress, this statute of limitations was extended for the third time. This extension was granted, in part, in order to provide more time to resolve those claims that would prove difficult to resolve through litigation. At the same time, Congress recognized that such extensions cannot be made indefinitely and required that the Interior Department, after consultation with the Attorney General, should submit a report to Congress by June 30 of this year containing proposals for legislative resolution of Indian claims which would be inappropriate to bring to court. To date, that report has not arrived.

Mr. Secretary, the June 30 deadline was set in recognition of the complexity of the claims which were likely to be included in the report and of need to provide Congress with ample time to review the proposals to resolve them. Accordingly, I would urge you to see that this report is made available as soon as possible. I understand that you personally have attempted to expedite this matter and I appreciate your efforts in this regard. Nevertheless, I would be grateful if you would give this matter your further attention and, if impediments to the report have been encountered outside the Interior Department, please so advise me.

With warm regards, I am
Sincerely,

WILLIAM S. COHEN,
Chairman.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., August 12, 1981.

Hon. GEORGE BUSH,
President of the Senate,
Washington, D.C.

DEAR MR. PRESIDENT: I want to report to you on our actions taken and planned in performing the task assigned by section 2 of the Act of March 27, 1980, 94 Stat. 126. That section provides:

Not later than June 30, 1981, the Secretary of the Interior, after consultation with the Attorney General, shall submit to the Congress legislative proposals to resolve those Indian claims subject to the amendments made by the first section of this Act that the Secretary of the Interior or the Attorney General believes are not appropriate to resolve by litigation.

The claims referred to are those which arose prior to July 1966 and stem from allegations that individual Indians or tribes suffered losses with respect to real and personal property held in trust by the United States for the individuals or tribes.

Upon assuming office in May of this year, I found that a great deal of work had been done in preparation for a submission to Congress. Over 15,000 potential claims have been identified and analyzed to determine, first, whether potentially valid legal claims exist, and second, that prospects for a recovery justify going forward with litigation. I did not find, however, that the analysis had given sufficient consideration to criteria or standards that we believe are highly significant in this matter. In some cases, technically valid claims appear to exist, but prospects for recovery are so poor or costs of recovery are so high as to rule out litigation. Many of those claims are, for various reasons, not candidates for legislative resolution. If legislation is deemed appropriate for any remaining categories of claims, I want to ensure that the most cost-effective avenue is chosen to administer or seek recovery. The cost of administration should have a major bearing on the type of proposal we may submit for any category of claims. We will need additional time to apply this standard in all of the detail required and to complete other related work. This work is under way, and a decision will be submitted on or before November 16, 1981.

A discussion follows of the categories of claims which have been considered in the analysis thus far. Prime characteristics of these categories (aside from the so-called Eastern Indian land claims) are that they involve allegations of erroneous actions on the part of the United States which may have contributed materially to Indian losses and the defendants apparently are innocent of any wrongdoing.

OLD AGE ASSISTANCE BENEFITS

This category of claims involves payment to states or their subdivisions out of the trust estates of Indians who had received state old age assistance during their lifetime. The payments were made in accordance with Department regulations. Approximately, $1.5 million was paid out of trust estates to reimburse the affected States. The claims in this category vary from $90 to several thousands of dollars. In 1962, a district court held this practice to be improper. The Department of Justice has determined these claims to be inappropriate for litigation.

SECRETARIAL SALES OF ALLOTMENTS IN HEIRSHIP STATUS

Since 1948, Bureau of Indian Affairs officials have approved the sale of inherited allotments on reservations which adopted the Indian Reorganization Act without obtaining the consent of all beneficial heirs. It is alleged that this practice is in violation of the Act of May 14, 1948, 25 U.S.C. § 483, which expressly conditions the authority of the Secretary to approve conveyances "upon application of the Indian owners." Of the approximately 10,851 heirs who received compensation for the sale of their interest in an allotment, 5,590 did not consent. Some $745,000 was paid to both consenting and non-consenting heirs.

WHITE EARTH ALLOTMENT CLAIMS

These claims would be for trespass damages relating to allotted lands on the White Earth Reservation which were forfeited for nonpayment of taxes, sold by minor mixed bloods without Departmental approval, or distributed by county courts exercising probate jurisdiction over the estates of deceased mixed blood Chippewas. The trust allotments of mixed bloods were the subject of the Clapp Amendment, 34 Stat. 353, which purported to remove the restrictions on sale, encumbrance, and taxation by converting the trust patents of such adult mixed bloods to fee patents. In 1977, the Minnesota Supreme Court held in *State of Minnesota* v. *Zay Zah*, 259 N.W. 2d 580 (1977) that the issuance of trust patents created vested rights in the Indians which could not be unilaterally terminated by the government. Such rights included the right to immunity from taxation for the original 25 year period plus applicable extensions. The pendency of these claims has clouded the titles of the current owners of these former allotments. Approximately 52,000 acres are affected by these claims.

ROAD AND UTILITY RIGHTS-OF-WAY

One of the largest categories of claims involves unauthorized electrical utility and road rights-of-way which cross tribal or allotted lands and which benefit the tribal community or allottee. The Department of Justice has determined these claims to be inappropriate for litigation because any damage to the Indian property is off-set by the benefits received by the Indians. In an action for damages, a court, perceiving that the Indians have been benefited by the right-of-way, would be unlikely to award significant damages. At present, we do not believe that this category of cases is appropriate for legislative remedy and should be handled administratively.

SAGINAW CHIPPEWA DUAL ALLOTMENTS

In implementing the Treaties of August 12, 1855, and October 18, 1864, the Secretary of the Interior initiated the process of allotting the members of the signatory tribes in 1871. Two categories of allottees were established: (1) competent; (2) not so competent. The "competent" Indians were to receive fee patents and the "not so competent" were to receive restricted patents. Errors apparently were made during the allotment process and in an attempt to remedy these mistakes, the Secretary of the Interior cancelled 105 fee patents. Twenty-eight parcels of the land on which fee patents were cancelled were reallotted to "not so competent" Indians in restricted fee status. In 1925, the U.S. District Court of Michigan's Eastern District ruled that the Secretary lacked the authority to cancel fee patents administratively. The U.S. conceded the correctness of this opinion and the BIA dropped the restricted lands from its allotment rolls. As a result, the heirs of twenty-eight Saginaw Chippewas apparently were deprived of a vested treaty right and twenty-eight present day landowners are without clear title.

While there are other claims or categories of claims which the Department must review for possible legislative resolution, the categories discussed above constitute a majority of the potential claims. Specific decisions, together with the appropriate mechanism for resolution, if any, will be submitted to you on or before October 30, 1981. Please note that this time frame does not include Eastern Indian lands claims because such claims are only peripherally related to the statute of limitations at this time. Some of these claims (i.e., Maine, Rhode Island, and the Pamunkey Indians in Virginia) have been settled by actions of the 95th and 96th Congresses. The office of the Assistant Secretary—Indian Affairs, in conjunction with the other federal agencies directly involved, will continue to monitor the progress toward resolving the remaining claims.

Sincerely yours,

Roy H. Sampsel,
Deputy Assistant Secretary—Indian Affairs.

U.S. Department of the Interior,
Office of the Secretary,
Washington, D.C., October 9, 1981.

Hon. George Bush,
President of the Senate,
Washington, D.C.

Dear Mr. President: On August 12, 1981, you were sent a letter reporting on the present status of our Statute of Limitations program. Please note that in the final paragraph of that letter an incorrect date for submission of the Department's decision was inadvertently included. The target date for submission of proposed legislation to the Congress is November 16, 1981, as stated in the last sentence on page 1 of the August 12 letter.

Sincerely,

Roy H. Sampsel,
Deputy Assistant Secretary—Indian Affairs.

U.S. Senate,
Select Committee on Indian Affairs,
Washington, D.C., December 16, 1981.

Hon. James Watt,
Secretary, Department of the Interior,
Washington, D.C.

Dear Mr. Secretary: As you know, in the last Congress the statute of limitations governing claims for monetary damages which sound in either tort or contract was extended to December 30, 1982, as claims brought by the United States on behalf of Indian tribes. This legislation directed the Secretary of the Interior in consultation with the Attorney General to submit to the Congress by June 30, 1981, proposals for legislative resolution of Indian claims which would be inappropriate to litigate.

On August 12 the Deputy Assistant Secretary for Indian Affairs in your Department forwarded a report to the President of the Senate briefly outlining the nature of claims which had been identified. Through no fault of his, this report was not received by this Committee until September 10. In the meantime, by letter of September 3, I wrote to you requesting early submission of legislative proposals in order that the Congress might begin consideration of the Executive Branch recommendations. By letter dated October 9, my Committee received further correspondence from your Department advising that the target date for submission of proposed legislation was November 16. As of the date of this writing, the Congress still has not received any legislative proposals either from the Department of the Interior or the Department of Justice.

Mr. Secretary, I consider this to be unfair to the Congress and unfair to the Indian people whose claims may be affected. I realize there are broad categories of claims which can be handled in single legislative packages. I do not believe it necessary or desirable for the Department to withhold submitting proposals in one category of claims until it has developed proposals in all categories. I understand, for example, that the Old Age Assistance Benefit claims are generally considered the most likely candidates for legislative selection. I also understand that there are over 2,000 such claims within this one category. There is no reason why legislative proposals for this category should not be submitted at this time, rather than waiting for development of solutions in more complicated categories.

A second category of claims listed in the August 12 Departmental report is "Road and Utility Rights-of-Way". The report notes that this is one of the largest categories of claims but concludes that the claims in this category are not appropriate for litigation or legislative resolution. Rather they should be handled administratively. I would like a report on this category of claims, including the legal analysis that leads to the conclusion that these claims will be defeated through counter-claims for offsets. I would also like to know what administrative process has been developed to handle those cases administratively, including notification of the interested parties.

At the hearings in the 96th Congress that preceded extension of the statute of limitations, witnesses for the Department of the Interior testified that approximately 9,500 claims had been identified. Many of these were being reviewed administratively to determine their merits. I would assume that at least some of these claims have been deemed without merit. In this regard, I would appreciate it if you would answer the following questions:

How many of these claims have been closed administratively?

If they have been closed, have the parties to the claims been notified of this action?

How many of these claims have been forwarded to the Department of Justice for action?

How many cases has the Department of Justice brought to suit?

Mr. Secretary, I am very disturbed at the delay involved in resolving these statute of limitations claims. It is my belief that the Old Age Assistance Benefits claims and the Road and Utility Rights-of-Way claims constitute somewhere in the area of 5,000 of the 9,500 claims identified in the 96th Congress. I strongly urge that your Department supply the Congress with recommendations in these two categories as quickly as possible. This will at least provide some initial momentum toward resolution of this vexing matter.

With best regards,
Sincerely,

William S. Cohen,
Chairman.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 18, 1982.

Hon. WILLIAM S. COHEN,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for letter of December 29, 1981, expressing concern over the Department of the Interior's efforts to legislatively resolve those Indian damage claims subject to the Federal Statute of Limitations.

We apologize for the delays in completing our review of these categories of claims which have been determined to be inappropriate for litigation. These delays can be attributed, in large part, to the complicated nature of the claims as well as the thoroughness of our review. We have completed our review of the three largest categories of individual Indian claims, including Old Age Assistance benefit claims.

A total of 10,212 claims have been considered for legislation. The Justice Department has recommended that most of these claims be resolved legislatively pursuant to section 2 of Public Law 96–217. We have determined that all but one type of claim are not appropriate for legislative resolution under the Statute of Limitations Program.

The claims considered for legislation can be broken down into the following three categories:

OLD AGE ASSISTANCE

We will soon present legislation to reimburse those trust estates whose funds were diminished to repay state or county welfare agencies for old Age Assistance payments, totalling approximately $1.5 million.

WHITE EARTH, FORCED FREE PATENT, AND OTHER TITLE CLAIMS

Several types of claims involve serious title problems. In these cases, we believe that it is inequitable to seek trespass damages from current occupants who are innocent purchasers. We have also determined that the value of the title aspect of these claims is greater than the damage aspect. The deadline established by Public Law 97–217 does not apply to the title aspect of these claims. Therefore, we have decided not to attempt to resolve these title issues within the context of the Statute of Limitations Program.

UNAPPROVED RIGHTS-OF-WAY

You have requested a report on road and utility rights-of-way claims, including the legal basis for the conclusion that any trespass damages would be offset by the benefits conferred by the roads or utility lines. By letter dated June 9, 1981, from the Assistant Attorney General for Land and Natural Resources, we were informed that the Department of Justice had rejected a large number of section line road and utility rights-of-way claims submitted for litigation by the Aberdeen Field Solicitor (copy enclosed). While the Justice Department conceded that technical trespasses exist, they concluded that the claims for damages are without merit because both types of rights-of-way claims confer benefits which completely or substantially offset the trespass damages.

A recent decision by the United States District Court for the Southern District of California confirms this conclusion. The United States, on behalf of the Mesa Grande Indians, sued the County of San Diego for injunctive and monetary relief alleging that the county had constructed a road across the Mesa Grande Reservation without an approved right-of-way pursuant to 25 U.S.C. § 311. Because there was no record of a right-of-way having ever been granted, the District Court permanently enjoined San Diego County from continuing its road trespass. The District Court, however, found that the county road in trespass conferred a benefit on the reservation land by providing a means of access to and from the reservation; any trespass damages were offset by the benefit conferred by San Diego County in constructing and maintaining the road. The Court awarded one dollar in damages.

There are 3,878 unapproved rights-of-way claims, consisting primarily of roads or utility lines. In virtually all these cases, the rights-of-way have been determined to be beneficial with little or no damage to the property. Therefore, we will seek to validate these rights-of-way administratively by requesting the appropriate parties to apply for a right-of-way.

The 1,200 claims still in active status are, for the most part, tribal claims involving damage to tribal fisheries or other natural resources, or diversion of water. Most of these claims require extensive research to determine if a tribe has been damaged and the extent of that damage. Evidentiary studies have been completed for most of the potential resource claims. This Department and the Department of Justce are reviewing those reports to determine which claims may be appropriate for litigation. There are also several types of claims involving the Pueblos, including land grant boundary disputes, water mannagement practices, and right-of-way disputes.

In reply to your specific question, we report that we have resolved 499 claims administratively. We have reviewed and rejected as No Claim, 13,643 possible claims. Our records show 307 claims presently active at the Department of Justice and an additional 56 claims filed by that Department.

The cases resolved administratively consist of those claims in which an agreement between two disputing parties was reached through negotiation and because the parties were directly involved, no further notice was needed.

The category Rejected as No Claim consists of those potential claims which were determined by the Department to lack merit as a statute of limitations claim. Since the potential claimants in these cases are heirs whose identity cannot be discovered without costly and time-consuming research, we have been unable to notify all those potential claimants of our decisions.

If we can be of further assistance, please let us know.

Sincerely,

KENNETH L. SMITH,
Assistant Secretary—Indian Affairs.

Senator COHEN. At this point, I would like to make it clear that I have no intention of supporting a general extension of the statute of limitations. Participation of the United States in these claims cannot be preserved in perpetuity. Claims have to be resolved. And the lethargic pace of which the United States is considering the claims and its defiance of congressionally mandated deadlines for performance on these claims, I think, is irresponsible.

Today, I propose to determine why the matter has been delayed, and to seek a more appropriate priority for the claims before the statutory period draws to a close.

We had scheduled Mr. Sampsel and Carol Dinkins for testimony, but since the Interior Department has not arrived as of this time, what I would like to do is perhaps reverse the witnesses and call Delfin Lovato and Alan Parker.

Perhaps Mr. Parker could provide us with case histories or, at least, a view of counsel representing the outstanding claims.

This will not take long and, I hope, will not in any way jeopardize whatever schedules you might have following this committee hearing. I will try to proceed as rapidly as we can.

Mr. Parker.

Mr. PARKER. Mr. Chairman, Suzan Harjo, representing Native American Rights Fund, I think, is also here, and if it is not out of order, I would like to request her to join me.

Mr. Chairman, we had prepared to make a presentation and with the chairman's permission, I would like to ask Suzan to take the lead on Indian witness testimony.

Senator COHEN. All right; fine.

STATEMENTS OF SUZAN SHOWN HARJO, LEGISLATIVE LIAISON, NATIVE AMERICAN RIGHTS FUND, WASHINGTON, D.C., AND ALAN PARKER, COUNSEL OF FUNKE & ASSOCIATES, WASHINGTON, D.C., REPRESENTING THE STANDING ROCK SIOUX TRIBE OF FORT YATES, N. DAK.

Ms. Harjo. Senator Cohen, I truly appreciate the remarks made about the way that this program has meandered through the system, not only in this administration, but in all previous administrations.

Not much has been done in this one, as we have detailed in previous testimony, which I would like to submit for the record. Our view—ours being the Native American Rights Fund, National Tribal Chairmen's Association, and National Congress of American Indians—is that the administration cannot meet the December 31 deadline and will expose the United States to breach of trust suits for failure to file in timely fashion.

Senator Cohen. Without objection, the documents will be entered in the record at this point.

[The documents follow. Testimony resumes on p. 28.]

Summary Points to Accompany Joint Statement of the National Congress of American Indians, National Tribal Chairmen's Association and Native American Rights Fund, Concerning Implementation of Public Law 96-217

1. The Administration has not complied with the requirements of Public Law 96-217 and will not fulfill its trust obligations to adequately process and resolve third party contract and tort claims for monetary damages it must pursue, under 28 USC 2415, on behalf of tribes and Indian individuals.

2. The Administration has failed to adequately identify claims, prepare cases, consult with affected Indian claimants and develop detailed plans and budgetary projections for resolving claims it considers inappropriate for litigation.

3. The Administration has not complied with Section 2 of Public Law 96-217, which required a legislative report by June 30, 1981; this calls into question its ability to meet the filing deadline of December 31, 1982.

4. The problem is beyond Indian control; it began as a result of an Act of 1966 that was not intended to apply to tribes and Indians.

5. The problem can be resolved by repeal of 28 USC 2415, as it applies to Indians, to be reenacted when the United States-trustee has performed its management obligations to inventory and survey property it manages on behalf of Indians and to research and investigate all pertinent records the various federal agencies maintain.

6. The problem can be diminished if Congress provides for an extension of time for a minimum of five years, in order for the Administration to adequately identify claims, prepare cases and recommend reasoned solutions to claims it will not litigate, and in order for negotiations to proceed and for legislation to be fully considered by Congress.

7. The problem will not go away without Congressional action.

8. The problem will be compounded if the December 31, 1982, deadline is not extended; hundreds of broad, protective suits will be filed as Congress adjourns for the elections if no action is taken; to do nothing is to create a run on the courts, to disrupt ongoing settlement talks, to harm Indian tribes and individuals and to expose the United States to massive liability through breach of trust suits.

Joint Statement of the National Congress of American Indians, National Tribal Chairmen's Association and Native American Rights Fund, Concerning Implementation of Public Law 96-217

We appear before this Subcommittee to express our view that the Administration has not complied with the requirements of Public Law 96-217. We are deeply

concerned that the United States will not fulfill its trust obligations to adequately identify, investigate, process and file or otherwise resolve third party claims for monetary damages it must pursue, under 28 U.S.C. 2415, on behalf of tribes and Indian individuals.

We offer our sincere appreciation to this Subcommittee for its time and attention over the years to this problem. The problem began with the Act of July 18, 1966 (Public Law 89–505), which established a six year statute of limitations for contract and tort claims for monetary damages brought by the United States on its own behalf. Nothing in the legislative history of this Act suggests that the Indian interest was considered or that Congress intended the law to apply to Indian tribes or Indian property. Indians did not testify or comment in regard to this Act, and no statutory limitation exists in any other area of federal Indian property law.

In 1972, however, the Administration requested an extension of time for the United States to file claims on behalf of Indians whose property is held in trust or restricted status. The Administration's witness told Congress that virtually no federal action had been taken to process potential claims in this category, or to inform Indians that time may be running on these claims.

Congress amended the statute to provide five years, until July 18, 1977, for the United States to file claims on behalf of Indian tribes and individuals. In 1977, when it became apparent that only minimal progress had been made, another Administration requested a 4½-year extension. Congress granted a 2½-year extension, until April 1, 1980. In 1980, with some progress made but much work remaining, Congress extended the time until December 31, 1982, setting an interim deadline of June 30, 1981, for the Administration to submit to Congress legislative proposals to settle those claims that the Secretary of the Interior or the Attorney General believes are not appropriate to resolve by litigation.

The Administration in 1972 tied its extension request to a broader initiative, the Indian Trust Counsel Authority, which was introduced but not enacted. Since that time, the requests concerning these claims have centered around time and numbers and categories of claims, without addressing the core of the problem: there should be no statute of limitations on these claims unless and until the federal government has faced up to its management obligations to perform the trustee services and collect the data necessary to discovery of valid claims. Before a statute of limitations bars Indian claims, Indians should be notified by the trustee of all potential claims they may have against third parties.

Federal agencies, not the Indian people, have the papers, records and accounts concerning the Indian property the United States manages as trustee. The federal government in general, and the Interior Department in particular, maintains the land records, survey maps, contracts and other information needed to bring these actions. Lack of access to this data severely limits the ability of Indian people to conduct their own research and bring actions without federal assistance. The federal government is responsible for gathering certain information that is prerequisite to the proper evaluation of these claims: accurate maps and surveys, allotment histories, land-use inventories, easement accountings, water-needs assessments and so forth. In great part, this basic information does not exist. In many instances, the federal records contain incomplete and contradictory data.

This point was made in 1979 Congressional testimony by Reid Peyton Chambers, who was Interior Associate Solicitor for Indian Affairs from 1973 to 1976. In calling for a repeal of 28 U.S.C. 2415, he characterized the problem as an "extreme lack of resources to service immense needs, legal and otherwise, of American Indians. The United States as trustee for the Tribes, has the responsibility for managing, conserving and protecting all trust lands and resources from outside encroachment. But the trustee has clearly not devoted sufficient legal resources to fulfill its responsibility. . . . While federal resources have been limited, the task required is massive. To assure that all valid claims are brought, reservation lands must be surveyed, tract by tract, to discover unlawful encroachments. Aerial photographs should be compared with section lines and metes and bounds descriptions. In addition, federal agencies have in their possession (generally deep in archival vaults around the country) the papers, records and accounts concerning Indian trust property. These must be searched, and the validity of each existing land use on Indian reservations should be analyzed. . . . The records of all (reservation) allotments must now be reviewed to determine where valid trespass claims exist following a forced patent. . . .

The title to every right-of-way grant in Indian country should be similarly searched and reported to the tribes and their attorneys before any statute of limitations is imposed. . . . the Indians should not be penalized and lose their property rights because the trustee did not know what property it manages and what claims it has, or because no action is taken by the trustee to learn and prosecute their rights."

Mr. Chambers also offered the following language to Congress to repeal 28 U.S.C. 2415 as it relates to Indian claims:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2415 of title 28, United States Code, is amended as follows.

§ 2415. *Time for commencing actions brought by the United States.*

(a) * * * "Provided further, that nothing in this act shall bar an action for money damages which accrued on or before the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band or group of American Indians, or on behalf of an individual Indian whose land is in trust or restricted status."

(b) * * * "Provided further, that nothing in this act shall bar an action for money damages which accrued on or before the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band or group of American Indians, or on behalf of an individual Indian whose land is in trust or restricted status."

The Indian beneficiaries of the trust relationship should not be penalized because the trustee does not know what it manages and the extent to which Indian property rights have been violated. An obvious general result of poor management practices and ill-conceived policy initiatives on the part of the trustee is the longstanding ranking of Indian people at the bottom of the economic scale in American society. Today, as unemployment on many Indian reservations tops 70 percent, and as Indian governments are called on to provide more services with less money, Indian tribes cannot be expected to devote sufficient resources to secure federal documentation and to bring these cases on their own. At the same time, many of these cases are key to tribal ability to use tribal property to lift themselves from poverty.

If the trustee fails to work with tribes to file or settle these claims, it forces the filing of hundreds of broad, protective actions to avoid being time-barred. Many of the suits that would be filed could be settled legislatively or administratively, given sufficient time, information and federal cooperation.

While we believe that Indian tribes are not bound by this statute of limitations because their sovereignty is inherent, not derivative from the sovereignty of the United States, many cases would be filed prematurely in order to avoid this issue.

Failure of the United States to bring timely suit on behalf of Indian people would subject the United States to suit by Indians for breach of fiduciary duty. These suits would involve extensive and costly litigation with a substantial risk of liability for money damages to the United States. This point is noted in the President's current budget proposal: "The program is designed to protect rights, and to avoid hundreds of million of dollars of governmental liability for failure to discharge the fiduciary responsibilities of the United States" (page 123, Justification of Appropriation Estimates for Fiscal Year 1983, U.S. Department of the Interior, Bureau of Indian Affairs, Trust Responsibilities, Indian Rights Protection, Statute of Limitations).

It is safe to say that the Administration is not breaking any records in meeting its responsibility to investigate and process claims under 28 USC 2415. The Department of Interior has missed last year's June 30 deadline for legislative proposals by nearly eight months. Effecting a unique administrative amendment, the Interior Department failed to acknowledge the June 30 deadline until Congress went into recess, informing the President of the Senate by letter of August 12, 1981, that the legislative proposals would be submitted by November 12, 1981.

To date, the Administration has not complied with this section of the law. The Interior Department's statement to the Subcommittee today cannot be characterized as meeting the legislative proposal requirement of Public Law 96-217. What the Administration advances today is a concept about the kinds of cases that are not appropriate to resolve by litigation. The Administration offers no specifics on the manner in which these claims may be resolved, administratively or legislatively, and offers no draft legislation or detailed plan. It has no record of consulting with the affected tribal and individual claimants on the detailed possibility of settlement, has not informed Indians and their counsel of the status of claims and has no budget estimates or proposals to back up their conceptual settlements.

The June deadline was added to 28 USC 2415 "to ensure that these claims are expeditiously and equitably resolved," according to Conference Report No. 96-843, March 24, 1980, to accompany S. 2222. Without consulting and working with the affected tribes and Indian individuals, there can be no equitable resolution of claims the Interior Secretary or Attorney General considers inappropriate for litigation. By failing to come forward with this legislative report at the mandated time, and by its vague presentation at this time, the Administration leaves Indians and Congress little substance to react to and little time to act, and obscures the manner in which it is progressing toward the filing deadline of December 31, 1982.

This brinkmanship style of implementing federal law is once again edging us toward a time limitation that was thought by many in Congress, at an earlier and more hopeful time, sufficient for completion of the task. The task has not been undertaken in good faith consultation with those whose rights are at stake, and there is some doubt that any part of it can be completed within the constraints of Public Law 96-217.

The scrutiny of this Subcommittee is needed more now than at any time in the history of this matter. You have brought clarity to this problem many times in the past, and the burden you have carried is greatly appreciated. In the past, the extent of the problem has not become apparent until the final weeks prior to the tolling of the statute. Congress will not be in session when this cycle completes itself. The combination of the election-year short session, Congressional attention that will be commanded by the budget exercises and the Administration's hiding the ball could result in injury to Indians beyond our control.

In considering this problem before, this Subcommittee reported that the Bureau of Indian Affairs and the Solicitor's Office "have not been able to perform the necessary work to identify all of those wrongs and then develop factual information necessary to get litigation filed. . . . *This inability to prosecute the present claims of Indians will work a hardship on tribes all over the country and may result in considerable loss to Indians through no fault of their own, losses which Indians can ill afford because of their low position on the economic scale. . . .*" (Emphasis added.)

During past extension periods, progress was made, despite five changes in Administration, various hiring freezes, inadequate funding and the low-priority view of these claims within all Administrations. In July of 1977, 340 claims were identified by the Department of Interior. The number of federally-identified claims increased to 4,500 in the summer of 1979; to 9,768 in December of 1979; to 12,000 in January of 1980; to 15,000 in May of 1981; and to 17,000 at the first of this year.

The Administration has disposed of a great number of these claims very quickly. It considers "active" only 1,200, according to Interior Department testimony today. Yet, in the President's budget proposal for fiscal year 1983 appropriations for the Department's statute of limitations program, the number of "active" claims is listed as 11,376. The Interior Department has referred approximately 350 cases to the Department of Justice, of which 56 cases have been filed and four complaints drafted, awaiting Interior approval. The Justice Department has 25 claims under review and 12 awaiting review. According to Assistant Attorney General Dinkins' letter of January 5, 1982, to Interior Committee Chairman Udall, the Department of Justice has rejected as non-meritorious 15 claims and has returned 242 claims to Interior with recommendations for legislative resolution.

We urge the Subcommittee to verify the status of these claims and take necessary action to ensure that they are properly reviewed and prepared, and that the tribes are advised well in advance of the statutory deadline of the Department of Justice's decisions. If the Departments of Interior and Justice are reluctant to field these claims for reasons other than the actual merits of the claims—potential United States liability, conflict of interest, political expediency and so forth—then specific appropriations should be made to ensure that the tribes are provided with the financial, professional and technical support necessary to litigate these claims.

The Department of the Interior recommends that one category of claims—old age assistance—be resolved through legislation at a cost of $1.5 million. This figure does not appear in the President's proposed budget for fiscal year 1983, which requests $2 million for the following purpose: "To identify, research, prepare, and file all valid claims . . . and to develop legislative remedies for certain types of claims in compliance with Public Law 96-217, Section 2." Does this mean that the Administration requests $500,000 to process all other claims? Does this mean that Congress will be presented with a legislative proposal at a later time that carried a separate request for $1.5 million? If this is the case, when will such a request be made?

The President's budget request for fiscal year 1983 statute of limitations funding is down from the $3 million fiscal year 1982 Appropriation. Justifying the $1 million decrease, the Administration states: "This reduction is a result of legal determinations reducing the number of cases which will be filed and litigated. A large number of sectionline road utility rights-of-way claims were submitted for litigation. While technical trespasses exist, the claims for damages are without merit because both types of rights-of-way claims confer benefits which completely or substantially offset the trespass damages. It is anticipated that these funds can adequately meet the need to pursue the evidentiary material, additional facts, technical studies, appraisals, etc., required to support the claims filed."

Concerning the Administration's conclusion to handle the rights-of-way claims administratively, Senate Select Committee on Indian Affairs Chairman Cohen made the following inquiry in his December 29, 1982, letter to Interior Secretary Watt: "The (August 12) report notes that this is one of the largest categories of claims but concludes that the claims in this category are not appropriate for litigation or legislative resolution. Rather they should be handled administratively. I would like a report on this category of claims, including the legal analysis that leads to the conclusion that these claims will be defeated through counter-claims for offsets. I would also like to know what administrative process has been developed to handle these cases, including notification of the interested parties." We have these same questions, Mr. Chairman, and urge the Subcommittee to attempt to find answers to them. To date, Senator Cohen has not received a response to his December letter.

We understand from the Interior Department's workplan that detailed legislative and administrative proposals were to have been submitted to Congress by October 30, 1981. As we all know, that date was optimistic in the extreme. We are aware that certain claims which may be appropriate for legislative resolution are still in various Bureau of Indian Affairs field offices and have not been submitted to the Washington office for analysis. For example, a litigation request on the part of the Swinomish Tribe, involving boundary disputes over tidelands and a part of the reservation excluded from its boundaries by Executive Order without proper authority, has not been forwarded from the Portland office.

For those cases which may be considered suitable for legislative solutions, legislative proposals have not yet been presented to the tribes. If the legislative proposal is turned down by a tribe in a specific case, the alternative of litigation will be difficult to pursue at this late date. For example, the Native American Rights Fund has submitted a request on behalf of the Shoshone-Bannock Tribes of the Fort Hall Reservation to recover the possession and value of 38 lots within the town of Pocatello, Idaho. While the Tribes have been asked whether they would consider a legislative solution, no specific proposal has been presented, and it is unclear whether litigation will be approved.

Settlement negotiations and passage of legislation can be an arduous, lengthy process. There is insufficient time to complete this process by the end of this year in a number of cases involving title, which is not affected by Public Law 96-217, and tort damages aspects. During one extension period, the Narragansett Tribe settled its title and damages claim through the Rhode Island Indian Claims Settlement Act of 1978 (Public Law 95-395, approved September 30, 1978), but it took 2½ years to resolve. During another extension period, the title and damages claims of the Pamunkey Tribe, the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians to lands in Virginia and Maine were settled through the Pamunkey Indian Tribe and the Southern Railway Company Settlement Ratification of 1980 (Public Law 96-484, approved November 24, 1980) and the Maine Indian Claims Settlement Act of 1980 (Public Law 96-420, approved October 10, 1980). The Maine Indian settlement was enacted after a 4½-year settlement process. Congress has before it the Chitimacha Claims Settlement Act (H.R. 5358, introduced on January 26, 1982), to settle the Tribe's title and damages claims to lands in Louisiana. Others in this category will be introduced in Congress during this session.

Time is needed beyond the December 31 deadline to allow for negotiations and legislation to proceed in orderly fashion. Should Congress take no action to extend the time, protective suits will be filed where none exist at present.

It is our understanding that the Solicitor of the Interior is withholding decisions on the tort damages aspects of stream adjudication requests because of his feeling that Indian water cases should be tried in state courts, which have no jurisdiction over the property conversion aspects. Above all other categories of claims, Indian tribes can least afford to bring these cases on their own, but will be forced into that position, triggering numerous breach of trust suits for failure to file in timely fashion.

Indian people have consistently called for repeal of 28 U.S.C. 2415 as it relates to tribes and Indian individuals. We have called for adequate extension periods, sufficient funding, oversight to hold the Administration's feet to the fire and a comprehensive programmatic approach to enable equitable and mature decisions. Consistent with the history of trustee advocacy, we have taken the crumbs of the trustee largess and pressed for whatever limited time we could get. We are at this point again.

We are back again to say that we are where we should have been in 1972, in need of a minimum of five years to develop and file or settle claims under 28 U.S.C. 2415. We believe many of our claims have been overlooked, ignored and arbitrarily rejected. We are victims of circumstances beyond our control. We need your help.

JUSTIFICATION OF PROGRAMS AND PERFORMANCE—ACTVITY: TRUST RESPONSIBILITIES; SUBACTIVITY: INDIAN RIGHTS PROTECTION

[From President's budget proposal justifying appropriation estimates for fiscal year 1983, U.S. Department of Interior Bureau of Indian Affairs, submitted to appropriations committees January–February 1982]

[Dollar amounts in thousands]

	1982 appropriation enacted to date	Fiscal year 1983		Increase (+) or decrease (−)
		Base	Estimate	
A. Environmental quality	$1,189	$1,193	$1,165	−$28
FIE–T	(22)	(22)	(22)	
B. Indian rights protection	17,327	17,276	17,083	−193
FIE–T	(86)	(86)	(70)	(−16)
Total requirements	18,516	18,469	18,248	−221
FIE–T	(108)	(108)	(92)	(−16)
Distribution:				
Tribe/agency operations	1,624	1,672	2,032	+360
638 pay cost			17	+17
Area offices operations	4,692	4,770	4,172	−598
Central office staff operations	972	799	777	−22
Other trust responsibilities programs:				
Archeological clearances	278	278	300	+22
Statute of limitations	3,000	3,000	2,000	−1,000
All other rights protection	4,800	4,800	4,800	
Alaska Lands Act	2,150	2,150	3,150	+1,000
ANCSA cemetery/historical sites	1,000	1,000	1,000	

ENVIRONMENTAL QUALITY SERVICES

Authorization.—25 U.S.C. 13 (The Snyder Act of November 2, 1921) is the basic authority under which the Secretary provides services to federally recognized Indians.

42 U.S.C. 4321, et. seq. This is the National Environmental Policy Act (NEPA) which establishes policy and goals for the Federal Government to fulfill "The responsibilities of each generation as trustee of the environment for succeeding generations." In order to achieve this policy, NEPA establishes the procedural

requirement that all major federal actions significantly affecting the quality of the human environment be preceded by an environmental impact statement.

16 U.S.C. 470 et seq. and 16 U.S.C. 470aa et seq. The National Historic Preservation Act and the Archeological Resource Protection Act establishes national policy for the management and protection of cultural resources.

Objectives.—The objectives of the Environmental Quality program are: (1) to ensure that proposed Bureau actions affecting the environment comply with NEPA and other acts of Congress regarding cultural resources and specific aspects of environmental quality; and (2) to review the proposed actions of other Federal agencies as part of the NEPA process to ensure that potential impacts on Indian lands and people are adequately considered. Other activities which are critical to the environmental function involve air and water pollution abatement, pesticide management, hazardous materials management, cultural and archeological preservation and acid rain investigations.

Base Programs.—The problems being addressed are basically those which have been recognized by Congress in enacting legislation for environmental protection and cultural resources management.

NEPA and various other acts such as the National Historic and Preservation Act, Fish and Wildlife Coordination Act and the Archeological Resources Protection Act require the examination of proposed actions on Indian lands to determine if they may affect the quality of the human environment or resources which are protected by specific statutes. These activities include coal mines, oil and gas exploration, uranium mining, timber harvesting, and other surface disturbing activities. When the examination or assessment indicates a significant impact, then an environmental impact statement (EIS) will be prepared to insure that the Indian people and Bureau officials are aware of impacts on the environment, the resources, tribal cultural heritage and social welfare.

The relationship between Environmental Quality and the other programs is that other programs initiate or receive proposals which may affect the environment, and the Environmental Quality program coordinates compliance with NEPA and other environmental laws. The Environmental Quality program also includes the coordination of activities regarding cultural resources, Clean Water Act, Clean Air Act, Endangered Species Act, Toxic Substances Control Act, other laws or regulations concerning the environment, and environmental issues which may not be addressed by existing law.

In complying with NEPA and other environmental laws, the Environmental Services Staff works quickly to determine which laws apply and the most efficient ways of obtaining compliances. As far as NEPA documents are concerned, action begins as soon as the project is defined. Schedules are set up and maintained to the maximum extent possible. Any problems that arise are quickly and thoroughly investigated and solutions are identified. It is the aim of the Environmental Services Staff to complete the documents as rapidly and accurately as possible in order that the decision maker may have the maximum amount of time and the best information available in order to make an informed decision. This philosophy has been working very well as the EIS(s) and EA(s) of the past few years have been completed very close to schedule. This includes large projects such as the Mt. Tolman Mining Project and smaller projects such as oil and gas leases for the Northern Cheyenne.

An important part of the Environmental Quality program is the review, commenting on, and dissemination of environmental impact statements prepared by other agencies to insure that the Indian people are aware of the proposed actions and the impacts that may affect them, and that their concerns are considered.

The Archeological Clearance Program is designed to examine areas on trust or federal lands being considered for construction or modification and to identify significant historic, archeological or scientific features, sites or data that may be present. If any of these features are found, measures are outlined to preserve, maintain or salvage the resources involved. These plans are also made available to the tribes.

Environmental program funds are used for personnel and support services at the Area level and the Central Office. Where staff are not available, we contract with private consulting firms for resource investigations leading to reports, preparation of assessments, and statements necessary to attain the objectives and goals of the program. The funds which are requested for the tribe/agency level are for such contracts, environmental assessments, archeological surveys, and water quality monitoring.

Of the twenty-two FTE for environmental services, 5 are located at the Central Office and 17 at the area offices. Not all environmental work is accomplished by these personnel. Efforts by staff of other programs (minerals, forestry, real estate, etc.) are required in environmental examinations and reviews. Funds for those activities are provided by those programs. In addition, there are major environmental assessments or impact statements which must be contracted for. Funds for those are not included here, because of uncertainty of total fund needs and timing. Funds for those are sought through supplementals, by use of related program funds, or by reprogramming requests.

WORKLOAD DATA

	Fiscal year—		
	1981	1982	1983
Environmental:			
Examinations	45,500	51,600	52,500
Assessments	700	700	7360
Impact statements	6	2	6
Reviews	420	420	450

Environmental examinations, assessments and reviews are routine in nature. Impact statements, however, are not routine and could be required at any time. They are usually a result of mineral development on reservations and are required before any leases to commence work can be authorized.

The EIS's which are listed above for fiscal year 1982 are projections of what may be required. The projects are the reclamation of the Jackpile Uranium Mines ($175,000) and the Hoopa River fishery controversy ($200,000). The increase in number of EIS's in 1983 is in anticipation of increased oil and gas activity.

DECREASE FOR FISCAL YEAR 1983

[Dollar amounts in thousands]

	1983 base	1983 estimate	Decrease
Environmental quality	$1,193	$1,165	–$23
FTE-T	(22)	(22)	
Distribution:			
Tribal/agency operations	28	22	–6
Area office operations	674	652	–22
Central office staff operations	213	191	–22
Other trust responsibilities programs: Archeological clearances	278	300	22

The net decreases of $28,000 is the result of adjustments in tribe/agency, area and Central Office priorities. This includes a reduction in personnel services and related operating expenses including travel.

INDIAN RIGHTS PROTECTION

Authorization.—25 U.S.C. 13 (the Snyder Act of November 2, 1921) is the basic authority under which the Secretary provides services to federally recognized Indians.

28 U.S.C. 2415 (Statute of Limitations) provides that the United States initiate claims for money damages in behalf of a recognized tribe, band or group of American Indians. This section also allows for similar actions for or on behalf of an individual whose land is held in trust or restricted status.

Public Law 97–487 provides for subsistence protection for Alaska Natives, conveyance of title to Alaska Native allotment applicants, and economic development grants to Native groups.

The Alaska Native Claims Settlement Act, Public Law 92–203, provides for the investigation and certification of cemetery sites and historical places and their transfer to Native Regional Corporations.

Objectives.—To preserve the resources and protect those rights which the United States guaranteed the various federally recognized Indian tribes through treaty, statute or executive order. In performing its responsibilities, the Bureau of Indian Affairs must meet whatever challenges may occur and initiate action necessary for the protection and continued viability of those rights. To provide for tribes the financial ability to become involved through legal or legislative advocacy; to address all unresolved issues; i.e., water rights, fishing and hunting rights, and to bring potentially contesting parties together on a broad scale to consider Indian rights issues and seek areas of common interests and goals.

Base Program.—Indian tribes are vitally interested in preventing the erosion of their rights. In addition to the Bureau of Indian Affairs, the Department of Interior Solicitor, and the Department of Justice both have key roles in rights protection. The Department of Justice usually represents the Indian interest in cases under adjudication. The Interior Solicitor provides legal advice to the Bureau and to tribes concerning rights issues, and prepares litigation reports for consideration by the Department of Justice.

It is the policy of the Department of the Interior to encourage settlements through negotiations rather than protracted litigation, where possible.

Seventy lawsuits related to Indian rights have been filed to date. Six of these will be in the trial or appeal stage during fiscal year 1983, requiring major litigation support efforts; thirty more cases will be active, requiring research and evidence gathering efforts; at least one hundred rights issues will be identified and negotiated, some requiring research and compilation of information.

It is incumbent upon the Federal government, by virtue of its responsibiilty to see to it that Indian rights are not abrogated, lost, or infringed upon. The majority of the tribes are not financially able to undertake the programs necessary to protect their rights and resources. As pressures mount on scarce resources, especially water, program efforts should be available to assure that Indian rights are effectively protected.

Area/Agency Operations ($5,740,000).—The rights protection activity provides the Bureau of Indian Affairs with problem-solving staff and technical support services at the reservation or regional level for the protection of the multi-billion dollar estate which the United States administers on behalf of the Nation's Indian tribes. This includes support to meet challenges to tribal rights and interests that are protected by treaty, statute, or Executive Order, as well as the initiation of those actions required of a prudent trustee to clarify the nature of and to ensure the continued viability of those rights.

Where negotiated agreements are not possible, this activity provides the historical, technical, scientific, and other professional expertise necessary for the Government to litigate challenges to Indian rights which the United States has guaranteed through treaty or statute.

The major costs for services required in the protection of Indian rights can not be met within the Tribe/Agency level of funding and has been programmed for several years in the subactivities described below; i.e., litigation support, attorney fees, unresolved Indian rights, hunting and fishing rights. Those subactivities are programmed at the Central Office, based on information provided by the tribes, Agency and Area Offices. The funds are used to support rights protection activities, on a priority basis, based upon the relative importance and urgency of the controversy being negotiated or litigated.

Central Office Staff Operations ($586,000).—This element provides the Bureau of Indian Affairs professional, technical and managerial personnel to administer the rights protection program at the national level, to undertake policy initiatives, to initiate and review legislation, to make allocation determinations for rights protection funds centrally controlled, and to issue and monitor contracts for rights protection research on a multi-regional or national basis. These staff work with all segments of the Bureau in rights issues affecting all Bureau programs.

Other trust responsibilities programs

Litigation Support ($1,762,000).—This activity provides the information and evidence gathering capability required by the United States to successfully defend the Government's position in litigation involving Indian rights issues. In some instances, the United States is suing in actions brought on its own behalf or on behalf of the Indian tribes; in others, is a named defendant in actions brought by third parties; and in others a named defendant in actions brought against the United States by Indian tribes. Litigation support is also provided to the tribe in cases where they are separately represented because other interests of the United States conflict with those of the affected tribe. In such cases, a trust relationship and fiduciary obligation still exists. Much of the activity conducted in support of litigation is actually directed towards negotiated settlement of lawsuits. The great majority of cases requiring litigation support involve the defense of Indian water rights. Others include trespass, title questions such as property line disputes, rights-of-ways, allotment claims, mineral entry, pollution issues, activities which have harmed or could harm the health and safety of the reservation population.

Attorneys Fees ($750,000).—Decisions of the Comptroller General and the Court of Appeals for the 10th Circuit have ruled that it is appropriate to expend appropriated funds to enable a tribe to retain independent counsel in situations in which the United States cannot represent them as contemplated by 25 U.S.C. 175, or where separate representation is required because of inherent conflicts of interest when the United States is representing its own proprietary interests, or because several tribes with conflicting interests are involved in the same case.

Regulations governing the expenditure of appropriated funds for the fees of private attorneys representing tribes in cases being litigated, or where the tribe is initiating litigation, are being promulgated. Following are the existing policy guidelines determining priority classification of eligibility for attorney fee funding:

(a) In the event that a tribe is sued directly and must defend its immunity from suit as well as on the merits and the Attorney General declines to defend the tribe, these facts will constitute the Bureau's first priority funding of a tribe's attorney's fees.

(b) In the event that the United States is sued and a tribe's (or tribes') rights and interests (e.g., *Winters* right) are challenged by the action and, in addition, other identified interests of the United States (BuRec, BLM, etc.), or the rights and interests of another tribe conflict with those of the affected tribe, such facts will constitute the Bureau's second-priority funding of a tribe's (or tribes') attorney fees.

(c) In the event that the actions (or inactions) of another party detrimentally affect the rights and interests of a tribe, and the Attorney General declines to bring suit to enjoin such action, thus forcing the affected tribe to bring suit to protect its rights and interests, such facts will constitute the Bureau's third-priority funding of a tribe's attorney's fees.

Unresolved Indian Rights Issues ($630,000).—This activity addresses a broad spectrum of rights issues not under litigation. The emphasis is upon identifying rights issues and obtaining satisfactory resolution at the lowest possible level. This activity was initiated about four years ago with requisite research undertaken to identify unresolved situations requiring action to protect and preserve Indian rights. Information generated by this activity is used primarily to seek and obtain a negotiated settlement; failing this, it can be used to support the initiation of litigation. Some of the issues identified can be resolved administratively or through legislation. The issues addressed include, among others, those involving water rights, mineral entry, trespass, title questions, renewable resources, pollution problems and activities which endanger reservation persons or property. In most cases, negotiated settlements will be obtained at the local Agency/Reservation level.

Hunting and Fishing Rights ($1,658,000).—Tribes are going to court to establish their rights not only to hunt and fish but also to assure that sufficient natural resources, i.e., water, forage, etc., are available to make those rights meaningful to prevent the misuse of the resources by persons and agencies; to guarantee that the resources are protected for use by future generations. This activity provides the United States and Indian tribes with the information necessary to determine the extent to which treaty hunting and fishing rights may be asserted without damaging the fish and game resources. This includes biological data collection and analysis to establish herd sizes, stocking rates, harvest quotas, and analysis of environmental development, and other impacts on fish and game resources. The information also provides a basis for self-regulation by tribes, which must be able to demonstrate to the satisfaction of the States and the courts that they have the management and enforcement capacity to regulate their members' exercise of treaty hunting and fishing rights in such a manner as to prevent depredation of the resources.

Status of Limitations ($3,000,000).—To identify, research, prepare, and file all valid claims for money damages against third parties which arose prior to 1966; and to file these claims before December 31, 1982, when the Statute of Limitations expires and to develop legislative remedies for certain types of claims in compliance with Public Law 96-217, Section 2. The program is designed to protect rights, and to avoid hundreds of million of dollars of governmental liability for failure to discharge the fiduciary responsibilities of the United States.

On March 27, 1980, Congress extended the deadline for filing claims under the Statute of Limitations (28 U.S.C. 2415), from April 1980, to December 31, 1982, in recognition of the large number of discovered claims to be processed and the large number of undiscovered potential claims.

We are presenting the Justice Department with "prima facie" cases. These are essentially protective suits whereby we make sufficient showing justifying a suit, but where additional evidentiary studies are needed to support facts, i.e., identification of heirs, title searches, technical studies, etc.

In order to support "prima facie" cases, programmatic surveys, appraisals, soil and range inventories, evidentiary studies and title research need to be accomplished. Because of the volume of work, a certain percentage of the caseload is contracted out. Most of the work that is contracted is highly technical, such as photogrammetric surveys, biological investigations, and other various types of land appraisals.

ANSCA Site Surveys ($1,000,000).—This funding provides field support units for investigation and certification of cemetery sites and historical places authorized by the Alaska Native Claims Settlement Act. Most of the sites are remote and accessible only by helicopter. Travel is an integral part of he ANSCA program, absorbing about ⅓ of annual funding requirements. Field Support units planned for fiscal year 1983 are located in Doyon, NANA, Bristol Bay, Calista and Aleut Regions.

With these funds, 160 sites will be located, additional information gathered and verified. The fiscal year 1986 target date for completion will not be reached due to increased costs, causing fewer sites to be completed. Two hundred sites per year would need to be accomplished for a fiscal year 1986 completion date.

Alaska Lands Act ($2,150,000).—As authorized by Public Law 96-487, the Alaska National Interest Lands Conservation Act (ANILCA), this funding provides for effective coordination/consultation with land managing agencies and the State on subsistence preference for Alaska Natives; administration of programs affecting the acquisition of Native allotments, and the administration of grants to each of the Native Group Corporations certified as a Native Group under the Alaska Native Claims Settlement Act. Supplemental funds will be used to establish an automated retrieval system for the allotment records. Inventories of merchantable timber on Native allotments will be accomplished. Trespass, abatement, and fire protection services will be provided for allotments. Of this amount $500,000 will be used for settlement costs of land selections for three Alaska Native Corporations, as required by the Alaska Lands Act. $250,000 of this amount will be used for economic development grants to Native Group Corporations.

Workload data

At the present time, approximately 70 lawsuits relating to Indian rights have been filed. Fifty-seven of these cases concern water rights. Of those, three are in the trial stage and twenty-five more may be characterized as active, priority matters. By fiscal year 1983, we anticipate that at least 3 or 4 more water rights adjudications will be filed by the States; that the three currently being tried will still be in the trial stage or under appeal; and that approximately five additional cases in the States of California, Arizona, New Mexico, Washington, and Montana will become active. In addition, each year Indian tribes are involved in over 100 administrative appeals or third party negotiations involving their property or sovereign rights. Active Statute of Limitations cases presently number 11,376. Of these, 307 have been submitted to the Department of Justice.

DECREASE FOR FISCAL YEAR 1983

[Dollar amounts in thousands]

	1983 base	1983 estimate	Decrease
B. Indian rights protection	$17,276	$17,083	−$193
FIE-T	(86)	(70)	(−16)
Distribution:			
Tribe/agency operations	1,644	2,010	+366
638 pay cost	0	17	+17
Area office operations	4,096	3,520	−576
Central office staff operations	586	586	-------------
Other trust responsibilities programs:			
Litigation support	1,762	1,762	-------------
Attorneys fees	750	750	-------------
Unresolved Indian rights issues	630	630	-------------
Hunting and fishing rights	1,658	1,658	-------------
Statute of limitations	3,000	2,000	−1,000
ANCSA site surveys	1,000	1,000	-------------
Alaska Lands Act	2,150	3,150	+1,000

Tribe/Agency Operations (*+$366,000*).—This increase represents funding levels established by tribal priorities, in accordance with their concerns for protection and understanding of their rights; and in accordance with Bureau emphasis to place a greater proportion of the Bureau's program efforts at the local agency/tribal level.

The fiscal 1983 request includes $17,000 to cover additional salary costs calculated at 5 percent of gross salaries for employees of tribal contractors in order to comply with the requirements of Sec. 106(h) of Public Law 93-638.

Area Office Operations (*−$576,000*).—This reduction resulted from a reduction of 15 FTE at the Area Office level, and from changes in Area Office priorities. In addition, the planned General Overhead Cost Reduction will affect the actual funding for Area Offices.

Alaska Lands Act (*+$1,000,000*).—These are the additional funds required for settlement costs of land selections from three Alaska Native Corporations, as required by the Alaska National Interest Lands Conservation Act, under Section 506(d) of Public Law 96-487.

Statute of Limitations (*−$1,000,000*).—This reduction is a result of legal determinations reducing the number of cases which will be filed and litigated. A large number of section-line road and utility rights-of-way claims were submitted for litigation. While technical trespasses exist, the claims for damages are without merit because both types of rights-of-way claims confer benefits which completely or substantially offset the trespass damages. It is anticipated that these funds can adequately meet the need to pursue the evidentiary material, additional facts, technical studies, appraisals, etc., required to support the claims filed.

OBJECT CLASS DISTRIBUTION

Position title	Grade	Number	Annual salary
Paralegal specialist	12	−2	−$56,490
Water resources specialist	12	−1	−28,245
Natural resources specialist	11	−1	−23,566
Archeologist	11	−1	−23,566
Realty specialist	11	−3	−70,698
Rights protection specialist	11	−1	−24,352
Rights protection clerk	4	−1	−11,490
Clerk typist	3	−6	−61,410
Total, permanent positions (FIE)		−16	−299,817
Other personnel compensation			−18,000
Total, personnel compensation (FIE-T)		−16	−317,817
Personnel benefits			−31,200
Travel and transportation of persons			−6,983
Other services			+141,000
Supplies and materials			−6,000
Total			−221,000

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., March 19, 1980.

MEMORANDUM

To: Steve Freudenthal, Executive Assistant to the Secretary.
From: Deputy Solicitor.
Subject: Options regarding certain categories of 2415 damage claims.

This is an option paper in response to positions taken by the Assistant Attorney General for Land and Natural Resources of the Department of Justice at a February 13, 1980, meeting with the Deputy Solicitor, regarding the three categories of 2,415 claims which were discussed at the meeting. Details of the February 13 meeting are set forth in my memorandum to you of February 19, 1980. The Acting Associate Solicitor for Indian Affairs, in his February 22, 1980, memo to you, furnished dollar information on the three main categories of claims discussed at the February 13 meeting.

PART I. OLD AGE BENEFITS REFUND RECOVERY CLAIMS

With regard to this category, the Assistant Attorney General feels that as a political and policy matter it is absurd for the United States to sue the States for money erroneously paid them by the United States. Rather, since the payments were the government's mistake, a legislative solution should be sought reimbursing the Indians at Federal Government expense in lieu of filing suits against State governments. We emphasize that Justice's desire not to file these cases stems from policy, and not from a professional judgment that the claims against the States have no legal merit.

In the 1940's and 1950's the BIA made these payments to the States and counties by order of the Department's Indian Probate Courts, in accordance with regulations on the subject. Then a Federal court in *Running Horse* v. *Udall*, 211 F. Supp. 586 (D.D.C. 1962), held that the Secretary had no legal authority to pay such claims. After this decision, the Secretary revised the regulations to disallow "social security or old age assistance payments." Interestingly, apart from the fact that such payments violated Federal Indian law, the United States itself would normally be entitled to a portion of the funds refunded since the Department of Health, Education, and Welfare put up half of the OA benefits paid out during the lives of the deceased Indian beneficiaries. It is important to note that while there are 2,632 of these claims, or about 25 percent of all 2,415 claims, Justice could sue on them all by filing no more than 25 complaints.

The proposed legislative remedy would entail a congressional authorization for the Department to pay damages to heirs of those allottees whose trust money was erroneously paid to the States. This legislation would call for setting up some sort of administrative process which would be responsible for reviewing the individual claims and ruling on the entitlement of each claimant.

Option 1. Inform Justice that we still consider the claim meritorious and urge the timely filing of lawsuits

Pro:

1. We will thereby continue to carry out our role as trustee by urging the processing of valid claims on behalf of our fiduciaries, rather than agree to drop valid claims for anything other than compelling legal reasons.
2. We will be "leaving the ball in Justice's park" placing public responsibility on that Department to make the final decision in each of the ca[illegible]
3. This will not necessarily preclude our seeking a legislati[illegible]edy in the event litigation fails.
4. We will not automatically assume for the Federal Government, and ultimately, the taxpayer, the burden of reimbursing our Indian claimants, before giving the chance to the judiciary to decide if the State should foot the bill.

Con:

1. To sue will stir controversy, especially because the payments should never have been made by the Federal officials in the first place. Further, if we sue for the entire amount, which includes the portion originally contributed by HEW, we would have to involve HEW to get the record straight.

2. If Justice refuses to follow our recommendation, it will be difficult to persuade OMB and Congress that an administrative claims process needs to be developed. Our Indian beneficiaries will be the ultimate losers.

Option 2. Pursue a legislative remedy but insist that Justice file protective suits if the statute of limitations is about to run, so that leverage is not lost in the pursuit of legislation

Pro:

1. Political benefit for our assuming liability which would otherwise be the States'.
2. A well designed administrative process for summary disposition of the individual claims may well be more efficient than asking the courts to sort out the merits of over two thousand of these small claims.
3. Since the heirs would ultimately be paid for money wrongfully refunded to the States, this would be consistent with our trust responsibilities.

Con:

1. The United States may end up assuming the entire financial burden even though it may not be legally liable to the heirs.
2. Justice may object to the filing of the protective suits for reasons that are not entirely clear.
3. While the proposed administrative process now appears relatively simple and inexpensive there is always the danger of maladministration of a new program, creating new problems and lawsuits.

Option 3. Agree with Justice not to file suits at all, and pursue legislative authority to reimburse the heirs

Pro:

1. Political benefit for our assuming liability which would otherwise be the States'.
2. A well designed administrative process for summary disposition of the individual claims may well be more efficient than asking the courts to sort out the merits of over two thousand of these small claims.
3. Since the heirs would ultimately be paid for money wrongfully refunded to the States, this would be consistent with our trust responsibilities.

Con:

1. The United States may end up assuming the entire financial burden even though it may not be legally liable to the heirs.
2. While the proposed administrative process now appears relatively simple and inexpensive there is always the danger of maladministration of a new program, creating new problems and lawsuits.
3. If OMB or Congress do not favor legislation and if the limitation period runs, the liability question of the United States for breach of trust arises.

Option 4. Do nothing

Pro:

1. The Department has met its trust obligation by sending the litigation request to Justice. Now it is that agency's responsibility.
2. We do not assume a time-consuming and costly legislative initiative.

Con:

1. Justice may publicly explain its inaction by stating that it had been awaiting our response to its proposal on legislation.
2. Possible liability of the United States, though Justice is not particularly concerned with this prospect.
3. If Justice takes no action, as is likely, the beneficiaries of our trust responsibility are the losers, regardless of who has the buck after its final pass.

PART II. UTILITY SERVICE AND ROADS RIGHTS OF WAY CLAIMS

With regard to these claims. the Assistant Attorney General is reluctant to sue because the BIA encouraged the erection of electric lines by the 3 electric co-ops, and the construction of roads by the counties. Furthermore, the electric lines and the roads have provided a real benefit to the Indians communities. We do not want to precipitate the discontinuation of services by suing utilities and counties for past trespass damages.

In this system the BIA encouraged the erection of electrical construction on reservations, the practice generally was to grant a permit to the coop to enter the reservations to install the necessary lines, provided the coop complied with all requirements of law regarding securing of rights of way. In many instances, rights of way were obtained and paid for by the coop, and often with the assistance of the BIA. In at least 510 instances in South Dakota, however, no rights of way were obtained, thus precipitating the three coop claims that we sent to Justice.

In the road claims we are requesting Justice to file at least 13 suits, nearly all against counties in the Dakotas, covering 531 claims. Those claims, combined with the 510 coop claims and the 2851 OA benefits claims, comprise over 40 percent of all 2415 claims identified to date. Road claims have arisen for similar reasons as coop claims except that ordinarily no permits were granted. As with coops, many rights of way were purchased by the counties with the approval of the BIA. But, as our research above, many were not purchased. In any case, it cannot be seriously disputed that the lives and property of the Indians have been enhanced by these services.

It is already possible for Justice and Interior to negotiate settlement of some of the disputes. Indeed, apart from the issue of the claims of trespass damages, the Bureau, utilities, counties, and Tribes should no doubt attempt to enter into valid right-of-way agreements for the future so that this problem does not continue to emerge. Settlement of the damage claims can be done in connection with such new agreements. However, in some cases damages are consequential and may not easily be compromised. In most instances damages are negligible. In this regard, the BIA estimates that there are about 25,000 miles of public roads on Indian reservations and that only about 10 to 15 percent have been checked out. A completed check will be made if S. 2222 passes.

The most simple legislative approach would be to authorize the Secretary to expend federal dollars, to assist in the settlement of the right of way claims. This authority could be discretionary, allowing the Secretary to decline to contribute to settlement in circumstances where the utility or county may in fact be culpable, or where damage claims are negligible.

Option 1. Insist that Justice pursue these claims, working toward out-of-court settlements wherever possible

Pro:

1. No legislation or new appropriations necessary.
2. Active fulfillment of our trust responsibility.

Con:

1. Justice may decline to file suits, allowing the claims to expire.
2. Such suits may be an embarrassment: "biting the hand that feeds . . . ."

Option 2. Seek legislation, but ask Justice to file protective suits with respect to unwanted rights of way or where there is actual and substantial damage to the land to prevent the running of the statute of limitations

Pro:

1. More flexibility in negotiating new right-of-way agreements.
2. Does not inflict draconian penalties on entities which had endeavored to serve Indian communities.
3. Keeps many small claims out of court.

Con:

1. Expense to the government (probably not great, though the scope of the Secretary's discretion to spend to settle these claims needs to be carefully circumscribed).
2. Again, Justice may oppose the concept of protective suits, though past claims will be barred after April 1 if the statute is not extended.

Option 3. Do nothing

Pro:

1. Since most of these claims are very small, there is little to be gained by pushing the matter.

Con:

1. The Bureau, utilities, and counties may lack the incentive to negotiate valid right-of-way agreements, and the problem will await another day.
2. Charges of breach of trust responsibility as to the larger claims.

Of these claims but that to ask for damages as well would precipitate adverse reactions, and that we could expect little success with the damages. It was also pointed out that in similar circumstances the United States does not ask for such damages when it sues to recover lands for itself. Mr. Moorman contended that the United States was at fault for not rectifying this problem years ago. He suggests that we therefore not sue for these damages and that we should request legislation to pay the damages.

These claims arose as a result of a 1976 State Supreme Court decision which held that the half-blood Chippewa allottees on the White Earth Reservation did not hold unrestricted fee titles to their allotments as a result of the Clapp Amendment in 1906, and therefore did not lose their exemption from taxation. A contrary view had been taken by several Solicitors and Commissioners of Indian Affairs. The subject lands are allotments that were improperly assessed for taxes and sold for failure to pay the taxes.

In many instances the damages we have requested are not based on comprehensive appraisals and may well result in being denied. Much of the land has remained vacant for many years, and has remained in the name of the counties that originally improperly assessed the property for taxes. In several instances, however, damages are clearly warranted, and would normally be sought had this litigation arisen between private parties. Such instances include removal of valuable timber by a timber company, or where an agribusiness, cattle company, or mineral company profited for years on the lands.

In addition to the foregoing, under the common law on trespass we would be entitled only to the provable damage wrought by the most recent owner unless we also sued past owners as well. The problem of proof can readily be seen.

Option 1. Agree with Justice to proceed with title suits and omit claims for damages, and together seek funds to pay the claims off from Congress

Pro:

1. Arguably, we are fulfilling our trust responsibility by seeking return of the land without attempting to crush innocent defendants.

Con:

1. When confronted with such legislation, Congress may choose to ratify the past illegal tax sales, thereby removing the lands themselves from the claims and imposing total liability on the United States.
2. Expense to the government.
3. If damage claims are not asserted and become barred, it may be difficult to persuade Congress to authorize federal expenditures when the Indian claimants are getting their land back anyway.
4. The Government will be footing the bill for persons and entities who acquired property without a sufficient title search having been done. They were on notice of the past tax sales, a tenuous link in any chain of title.
5. This is, at bottom, a litigation management problem which requires no legislative initiative.

Option 2. Insist that Justice pursue damage claims in appropriate cases

Pro:

1. No legislation or further appropriations necessary.
2. Justice may decline to seek damages in instances where they may be offset by valuable improvements placed on the property, or for other appropriate reasons.

Con:

1. "Overkill" in Justice's perception.
2. A problem of timing, since it may be difficult for Justice to sort out the meritorious damage claims from the weaker ones prior to April 1. One or two Interior attorneys might be assigned there to assist in this task.

RECOMMENDATIONS

With respect to the options relating to the three issues above-described, I recommend that the Department adopt options as follows:

I. Old Age Benefits Claims: Option 3.
II. Utility Service and Roads R/W Claims: Option 2.
III. White Earth's Damage Claims: Option 2.

FREDERICK N. FERGUSON.

EVERGREEN LEGAL SERVICES,
NATIVE AMERICAN DIVISION,
Seattle, Wash., February 10, 1982.

SUZAN SHOWN HARJO,
Native American Rights Fund,
Washington, D.C.

DEAR SUZAN: I understand that you are preparing a presentation for the House Committee which will hold oversight hearings on the administration's handling of 2415 claims. You have asked for any information we can provide on this subject.

In submitting the following information, we are assuming that the committee understands or will be briefed on the United States trustee's responsibility to the individuals and tribes who have claims affected by 28 U.S.C. § 2415. It seems to us important that someone remind the committee that the Interior and Justice Departments in particular, as trustees and attorneys for the Indian claimants, have a duty to act with undivided loyalty on the Indians' behalf.

Lawyers in this program have assisted their client tribes and some individual Indians in submitting to the Bureau of Indian Affairs numerous claims which would be affected by § 2415. We have been bewildered, dismayed, and even angered at the way these claims are being handled by the Departments of Interior and Justice. Although we have seen some increase in Interior Department activity since the extension of § 2415 in April 1980, the Government's efforts on the whole appear to be far too little, too equivocal, too late. We reluctantly conclude that the United States Government is on the verge of abdicating its responsibility for righting wrongs done to thousands of Indians across the country.

To date the United States has filed only a tiny handful of claims from our area in federal court. Claims which were brought to BIA attention as many as eight years ago have not been acted on; and the persons who are purportedly reviewing those claims cannot or will not tell us when the U.S. will decide whether to pursue them. Having failed to meet the congressionally mandated deadline of June 1, 1981, Interior Department officials have yet to submit to Congress any proposals for legislation to deal with claims which may not be suitable for litigation.

Less than eleven months remain before the statute of limitations is tolled. We see little in the Interior and Justice Department's current approach to give us hope that within that time the Government will process and carefully consider all remaining possible claims, notify Indian claimants of its decisions, and formulate legislation where appropriate. If the United States' obligation is to be met, there must first be a reversal in the tendencies which have characterized the agencies' actions related to 2415: disorganization, half-hearted effort, disdain for Indian interests, and underfunding.

Following is a summary of what we have observed and experienced as we have monitored the progress of our clients' damage claims through the Interior and Justice Departments, particularly since April 1980.

A. THE TWO DEPARTMENTS HAVE NOT CARRIED OUT THEIR ADMITTED RESPONSIBILITIES EFFECTIVELY

It is difficult for us to explain and in some instances even to document the administrative actions and inactions which I have complained of in general terms here. For lack of information on what the departments are or are not doing is itself one of our principal complaints.

We or our clients have submitted to the BIA dozens of claims which will be barred after December 31, 1982. No matter where in the administrative process a claim is—from the local agency level to the Department of Justice—neither we nor our clients are routinely informed of the claim's status. In order to learn what is being done with a claim, we have had to inquire, sometimes of several different people and sometimes repeatedly. During the past year, there has been some increase in the communications directed to us by our area office of the BIA and Interior Solicitor; but this has come about largely as a result of our persistent requests, not as the result of a department system for or policy of notifying claimants about the fate of their claims. For example, we learned well after the event, that a few claims had been recommended for litigation, referred to the local attorney general's office, and filed in district court. The Indians who might receive damages as a result of this litigation did not even know that lawsuits were in progress let alone have an opportunity to review the complaints for accuracy.

Once a claim has been forwarded from the area office to Washington, D.C., for review, our difficulty keeping track of it increases many fold. Several problems combine to create this situation:

1. Neither Interior nor Justice has developed a standard national numbering or other indexing system for use in inventorying and tracking the thousands of cases being referred to them from all over the country.

2. Perhaps for lack of such a numbering system or perhaps because of poor organization and staff turnover, cases sometimes get lost in the bureaucratic pipeline for a while. We know of at least two claims the files for which could not be located either at the area level or in Washington, D.C. for several weeks.

3. Changes in personnel and in the Administration appear to have disrupted the procedures for reviewing some cases. We have observed, at least, that some claims which had reportedly been reviewed at one level have later been assigned to a new person at the same level for review *de novo*. Processing of some claims appears to have stopped altogether since the Reagan Administration took office; but we have not been able to confirm our suspicion that they are being reviewed by high level officials, let alone learn the Departments' current views on the claims' merit. Again, because we are not as a rule kept informed of a claim's movement through the agencies, the many variations in the way claims are processed put a significant burden on us if we wish to follow a claim's progress. Since we may be able to respond to questions and doubts on the part of solicitors or Justice Department attorneys, it is important for us to know or be able to learn quickly who is currently responsible for reviewing it.

4. On more than one occasion we have received conflicting information from the Interior and Justice Departments about the location of a case file, the status of a claim, or department policy regarding certain claims. When each department asserts that the other one currently has responsibility for processing a claim, we must assume that neither is actively working on it. This buck-passing is not uncommon.

5. Most frequently, claimants and their attorneys get no response to inquiries that they direct to people who either have responsibility for reviewing claims or should know who does have responsibility. Letters go unanswered; telephone calls go unreturned. Despite concerted efforts, we are thus sometimes unable to learn the status of claims we have referred.

From the information we do have on the Government's processing of § 2415 claims, it is hard to resist the conclusion that the departments are deliberately obscuring our view. For what we see suggests that the departments are at best making only half-hearted efforts and at worst obstructing efforts to get the Indian claims resolved. We draw this conclusion from facts such as the following:

1. The local U.S. attorney who is responsible for reviewing, filing and presumably trying 2415 claims from this area told one of our staff lawyers that he is not eager to prosecute cases involving ancient wrongs. "Frankly," he said, "there is not a hell of a lot of sex appeal in these cases."

2. The BIA has made and intends to make no effort of its own to uncover possible claims, despite the fact that it is custodian of the records which would provide evidence of such wrongs as trespass, illegal alienation of trust property, and unpermitted rights-of-way. Moreover, the Bureau has frequently put the burden entirely on tribes or individual Indians to document claims, regardless of whether or not they have the resources to do so.

3. Case files prepared by Interior and submitted to the Justice Department have been returned to Interior for failure to address the basic legal questions or provide basic facts.

4. The Interior Department has failed to meet either the schedule set for it by Congress in Public Law 96–217 or the internal schedule it devised for processing claims.

5. The Government has taken no action at all on many important claims. We are aware of several tribal claims which were brought to the Interior Department's attention as early as 1973 and 1974. Most of these have languished in Washington, D.C., with no sign of movement and no explanation from department staff for the Government's failure to act.

6. More often than not, the claims which do receive some Interior and/or Justice Department attention are those which we or the Indian claimants repeatedly inquire about and furnish additional information about. Although the

squeaky wheel may not ultimately get grease, it stands a much better chance than the quiet wheel of getting inspected. Many of the Indians who have an interest in the claims under review do not have the resources to lobby their cases through the departments.

B. INADEQUATE FUNDING HAS ALSO HAMPERED THE TWO DEPARTMENTS' EFFORTS UNDER § 2415

In some instances, the failure of one or both departments to act on § 2415 claims can be explained by lack of funds. Whether the funding problems stem from insufficient congressional appropriations or from agency allocation decisions we are unable to say.

We were informed that the BIA requested supplemental funding of approximately $1.5 million for the Portland area office's 2415 work during fiscal year 1981. However, Portland reportedly received only one third of that amount. The funding shortfall was offered as an explanation for the agency's decision to develop only a fraction of the fisheries damage claims identified in our area. The Bureau had originally proposed to do technical studies which would document damage claims on fourteen watersheds. Allegedly because it could not afford more (not because of the claims' relative merits), studies were commissioned on only five streams.

Early in 1981 a regional solicitor gave us another example of the problems caused by insufficient funding. Two cases filed in district court here were dismissed for the Government's failure to serve defendants. These trespass actions involved numerous defendants, and neither the U.S. Marshal's office nor the Justice Department had funds to cover service of process.

Finally when the Interior Department's 2415 claims coordinator left office in late 1980, he expressed alarm at the small amount recommended by the House Appropriations Committee for fiscal year 1981 claims work. "[I]n my opinion," he wrote, "the program cannot succeed under present budget conditions. In addition to this the program effort is being gravely hindered and delayed because of hiring ceilings, travel restrictions, and by not making the SLCP funds 'any year' funds."

C. CERTAIN INTERIOR AND JUSTICE DEPARTMENT POLICIES AND ACTIONS WILL SERIOUSLY PREJUDICE THE RIGHTS OF INDIAN CLAIMANTS

When we do get information about the departments' approach to the § 2415 claims, we are frequently dismayed by their disregard for the Indians' rights and interests. At stake here is the right of Indians who have been damaged to seek compensation in court. If the Indians' trustee does not act on their behalf, individuals (who may not as a matter of law be able to plead their cases themselves in federal court) and tribes (which may lack resources to pursue claims on their own) could be barred forever from seeking relief. Yet the two responsible agencies appear to be deciding how and whether to press the Indian claims on bases other than the interests of the Indians or the merits of their claims.

1. The Interior Department has yet to propose legislation which might resolve thousands of claims not deemed suitable for litigation, even though internal memoranda show that as early as November 1980 the department identified at least three types of claims which could appropriately be addressed in the aggregate this way. The areas identified involve forced (illegal) conversions of trust land to fee, use of trust assets to reimburse states for old age assistance payments, and illegal right-of-way across Indian land. We were recently told by a regional solicitor that the department has tentatively decided not to propose any bills covering the forced fee and right-of-way claims. If such a decision has been reached, it cannot be based on the conclusion that all such claims are without merit. Internal communications we have seen lead us to believe that the department is guided by political considerations. But it is just such political factors which Congress, not the Indians' trustee, must consider.

2. Even claims which are *not* being viewed as candidates for legislation are judged on the basis of political or other irrelevant considerations rather than their legal merits. Department personnel sometimes show greater concern for potential defendants—particularly the innocent purchasers of Indian land which was illegally sold—than they do for the Indians or heirs of Indians whom they admit have been wronged. Similarly, we have learned that Interior Department officials have decided not to pursue numerous cases involving illegal rights-of-way

because they deem—without investigating further or getting the opinion of the interested Indians—that such rights-of-way have benefitted the Indian land owners.

3. If the Interior Department does submit to Congress proposals for legislation that would resolve some of the 2415 claims, it does not intend to make its proposals known to the tribes affected. This failure to give the tribes an opportunity to comment on proposed bills may be a violation of the Indian Reorganization Act, 25 U.S.C. § 476. It certainly is inconsistent with the Administration's commitment to Indian tribal self-determination.

4. The two departments' delay in deciding whether to recommend many claims for litigation and their failure or refusal to explain the delay have raised in us strong doubts that they will ultimately file the claims. In most of these instances, our clients must decide whether to prosecute the claims themselves if the United States will not. We have advised our clients that their claims may also be barred by the operation of 28 U.S.C. § 2415. Therefore, we and our clients have an urgent need to know as soon as possible that the Government will not act on their behalf. We must have time at least to try to locate funds for litigation expenses, time to try negotiating the claims, and time to prepare the necessary pleadings. Neither Interior nor Justice, however, has set a date by which it will notify claimants that their request for U.S. assistance will be denied. Unless the departments do this, our clients' rights could be seriously prejudiced.

5. As mentioned above, the Interior Department has arbitrarily limited the work it will do to investigate, document, and analyze major fisheries damage cases from our area. While insufficient funding may explain the fact that only five claims are being documented, it does not excuse the fact that dozens of similar potential claims were identified but are not being investigated. The BIA does not contend that the abandoned claims are without legal merit. They are simply less valuable claims with less dramatic facts than the five which will be fully reviewed.

6. One reason so few fisheries damage claims will make it through channels to a final review by the Justice Department is a Justice Department directive issued in September 1980. That directive required that the Interior Department supply extensive information on each claim before the claim would be evaluated. Among the types of information to be supplied was actual damages. Proving actual damages to a fishery over many decades is a very difficult, expensive process. In our opinion, the Justice Department's requirement was unnecessary and unreasonable. Once the fact of compensable damage and its cause can be demonstrated with reasonable certainty, the U.S. has a basis for suit. Actual damages can be proven well after litigation has begun.

7. As we have talked with various lawyers in the two departments about some claims, we have encountered repeatedly an unwillingness to consider seeking not only damages but also equitable remedies for the wrongs done. Many of our clients are primarily interested in relief other than money; yet they are aware that a request for damages can provide leverage in a suit which also asks for equitable relief. The U.S. attorneys seem unaware of or uninterested in this. We fear that they may decide not to file some cases in the belief that the damage claim is unimportant and a quiet title or injunctive action can be brought later.

We hope that the information we have provided here will prove useful to the committee in its evaluation of the statutes of limitations claims program. Because we do not know what the committee has set as its purpose in holding the oversight hearings or what powers the commitee may have to remedy the problems we describe, we do not feel competent to suggest whether and how the committee can ensure that the U.S. does not violate its trust responsibility to its Indian citizens. Among the steps we would be glad to see the committee take are the following:

1. If the committee believes that 28 U.S.C. 2415 does not or should not bar claims by Indians or Indian tribes on their own behalf, it could clarify that in legislation or in the legislative record.

2. Examination of some proposals for legislative solution of claims even where the Interior Department has not chosen to make the proposals itself; e.g., forced fees, illegal rights-of-way.

3. Appropriation of funds to be granted directly to tribes and Indians so that they might prosecute their own claims in the absence of U.S. action.

4. A deadline by which the Interior and Justice Departments must inform Indian claimants that they do not intend to file claims on the Indians' behalf. The deadline should be at least four months before December 31, 1982.

5. Guidelines or standards designed to facilitate the kind of communication with claimants and their attorneys that has been lacking.

Thank you for this opportunity to voice our concerns. We appreciate your efforts in this important area.

Sincerely,

SASHA HARMON,
Coordinator.

Ms. HARJO. Also, I would like to submit for the record, if it is permissible, our statement before the House Appropriations Committee which looks at budgetary aspects of the administration's proposal to cut by one-third the statute of limitations' program; to significantly cut the moneys for attorney's fees and for litigation support.

Senator COHEN. That, too, will be entered in the record at this point.

[The statement follows. Testimony resumes on p. 30.]

STATEMENT OF SUZAN SHOWN HARJO, LEGISLATIVE LIAISON, NATIVE AMERICAN RIGHTS FUND, CONCERNING THE STATUTE OF LIMITATIONS PROGRAM OF THE BUREAU OF INDIAN AFFAIRS AND THE SOLICITOR'S OFFICE OF THE DEPARTMENT OF THE INTERIOR

My name is Suzan Shown Harjo. I am Cheyenne and Creek, with citizenry in the Cheyenne and Arapaho Tribes of Oklahoma. As Legislative Liaison for the Native American Rights Fund, I am here to urge this Subcommittee to:

(1) Earmark and add fiscal year 1983 funds for the Statute of Limitations program of the Bureau of Indian Affairs and the Solicitor's Office of the Department of the Interior;

(2) Provide fiscal year 1983 funding for Statute of Limitations litigation support, and for attorney fees in cases where the United States has conflicts of interest; and

(3) Require the Department of the Interior to account for its fiscal year 1982 expenditures for Statutes of Limitations processing through December 31, 1981, and to prepare a cost/function projection for fiscal year 1982 expenditures from January 1, 1982, through the end of this fiscal year.

This Subcommittee earmarked $3 million in fiscal year 1982 funding for the Statute of Limitations program of the Office of Trust Responsibilities, Indian Rights Protection, BIA. The Administration's fiscal year 1983 request is for $2 million, a one-third decrease from the fiscal year 1982 appropriation. (The Administration's request and justification for fiscal year 1983 estimates begins on page 117 of the BIA budget proposal.)

The Statute of Limitations program is established pursuant to 28 USC 2415, as amended in 1980 by Public Law 96-217. Public Law 96-217 requires the United States to file against third parties by December 31, 1982, pre-1966 contract and tort claims for monetary damages on behalf of tribes and Indian individuals. Section 2 of the Act requires the Administration to submit to Congress by June 30, 1981, legislative proposals to settle those claims that the Secretary of Interior or Attorney General believes are inappropriate to resolve by litigation. As of today, nearly eight months after the statutory reporting deadline, the Administration's legislative report has not been submitted to Congress, which raises a serious question about the Administration's ability to comply with Section 1 of the Act to meet the filing deadline of December 31, 1982.

On February 17, 1982, the House Judiciary Subcommittee on Administrative Law and Governmental Relations held an oversight hearing on the Administration's implementation of Public Law 96-217. Provided for your information are copies of the joint statement of the National Congress of American Indians, National Tribal Chairmen's Association and the Native American Rights Fund for the oversight hearing. In our testimony, we expressed deep concern that the Administration has not complied with the requirements of Public Law 96-217, and our view that the United States will fail to fulfill its trust obligations to adequately identify, investigate, process and file or otherwise resolve these claims. We requested an extension of time beyond December 31, 1982, in order to avoid the filing of hundreds of broad, protective suits, disruption of ongoing settlement talks concerning title claims with tort aspects and exposure of the United States to massive liability through breach of trust suits for failure to file in timely fashion. An extension of time is necessary for adequate processing of claims, for protection of Indian rights, for consulting with affected tribes and individuals on litigation and other forms of resolving claims and for beginning and concluding legislative and administrative resolutions.

In response to questioning during the February 17 hearing, an Administration witness from the Interior Department admitted that the United States is not in compliance with Section 2 of Public Law 96–217. All Administration witnesses denied the need for an extension of time, maintaining that all claims would be processed and filed or otherwise resolved by the end of the year. An Interior witness told the Subcommittee that all claims would be forwarded to the Department of Justice by June 30, 1982. A Justice Department witness stated that all claims forwarded by that date could be filed by December 31, 1982. In our view, the Interior Department cannot meet this mid-year deadline, and the Justice Department cannot meet its year-end deadline. The claims that have meandered through the system since 1966 and the claims that have not been processed into the system cannot be processed within the time constraints of Public Law 96–217. The Departments of Interior and Justice have not consulted with the affected tribes and individuals on claims they have rejected recently. There has been no consultation with Indian claimants on the Administration's proposals for legislative and administrative remedies, and Indian claimants have not been advised of administrative decisions to do nothing in regard to their claims. Further, the Administration has not developed a plan to implement its concepts for administrative resolutions, and has not submitted a single legislative proposal to Congress.

The Interior Department has referred approximately 350 cases to the Justice Department. The Interior Department has 1,200 claims it considers "active," according to its February 17 testimony. The BIA justified its $1 million decrease on the basis of a caseload reduction in the category of unapproved road and utility right-of-way claims. It proposes an administrative remedy for this category, but has advanced no details. As Indian claimants learn of this decision, there will be appeals, which will require staff and funding not anticipated in the BIA budget request. On December 29, 1981, Senate Select Committee on Indian Affairs Chairman Cohen requested Interior Secretary Watt to provide "a report on this category of claims, including the legal analysis that leads to the conclusion that these claims will be defeated through counter-claims for offsets. I would also like to know what administrative process has been developed to handle these cases, including notification of the interested parties." To date, Senator Cohen has not received a response to his request.

The BIA justification document of some weeks ago refers to over 11,000 "active" claims. The reason for the sudden drop, from 11,000 to 1,200, is given in the February 17 Interior testimony: "We plan to present legislation to reimburse those trust estates whose funds were diminished without the consent of the heirs to repay state or county welfare agencies for Old Age Assistance payments, totaling approximately $1.5 million." This $1.5 million figure does not appear in the Administration's proposed budget, nor does reference to this remedy, despite the fact that decisions on the rights-of-way and old age assistance claims were made at the same time. Does the Administration intend to process all 1,200 "active" claims at a cost of $500,000? If not, when will the Administration request Congress to authorize and appropriate the remedy and the $1.5 million?

The Administration's justification for fiscal year 1983 funds for this program, like its implementation of Public Law 96–217 generally, is poorly conceived and insufficient. We urge the Subcommittee to increase and earmark funds for proper implementation of this law in specific programs and offices, including:

(1) *BIA Statute of Limitations Program.*—Restoration of the $1 million for the purpose of processing claims now identified, and for processing claims not presently acknowledged by the BIA; and,

(2) *BIA Litigation Support.*—Increase of at least $1 million for case-preparation, studies, expert witnesses and so forth (this item appears on page 122 of the BIA budget request; all items referenced are claims under 28 USC 2415 or involve tort aspects)—the request for $1.762,000 is inadequate to support litigation presently underway and contemplated; and,

(3) *BIA Attorneys Fees.*—Increase of at least $750,000 for cases where the United States has a conflict of interest—the pending request for $750,000 is indefensible, in light of the present caseload and anticipated cases requiring independent counsel; and,

(4) *Office of Associate Solicitor for Indian Affairs.*—Increased or earmarked funds for field, regional and central office levels for staffing for adequate review and preparation of claims refered to the Justice Department, and for litigation support; and,

(5) *Indian Tribal Funding.*—To ensure that Indian claimants are provided with financial, professional and technical support necessary to litigate claims rejected by the United States for reasons other than the legal merits of the claims.

Mr. Chairman, our figures are as much a product of guesswork as are those of the Administration. The only way that the Subcommittee will be able to assess the dollar need for fiscal year 1983 funds is by examining the fiscal year 1982 expenditures and projections, comparing by function and plans the ability of the Administration to conduct its work within this fiscal year. This review would indicate the projected caseload and needed funds for administrative and legislative procedures, as well as the amount of work that is likely to be put off until the coming fiscal year. We would be pleased to work with the Subcommittee to assist in this effort. It is an effort that only this Subcommittee can appropriately initiate at this time, and one that the Subcommittee needs to initiate before making informed decisions on this category of funding.

Thank you for your time and attention to this problem. It is not a problem that will go away soon. It is not a problem that will be resolved by allowing the statute to toll or by allowing the Administration to do little to meet is responsibilities to Indian peoples and to the non-Indian people. We feel that the Administration intends to do as little as possible to comply with Public Law 96-217. We need your help to assure that these claims are processed and resolved in an orderly manner, without injury to Indian tribes and individuals and without exposing the United States to substantial breach of trust suits.

Ms. HARJO. It also fails to include a request for the only legislative proposal that the administration has announced, which they calculate will cost $1.5 million, to resolve the old-age assistance claims. In the February 17 testimony before the House Judiciary Subcommittee on Administrative Law and Governmental Relations, the administration witnesses said that this money would either come from existing funds or be the subject of a proposal to be submitted later. We do not know when that later might be. We are past the time for fiscal year 1983 budget proposals to be submitted to Congress. If it comes out of existing funds, that would leave $500,000 for the carrying out of the rest of the program.

In the February 17 hearing, the administration witnesses admitted that they were not in compliance with section 2 of the law, requiring the legislative reports now 9 months overdue, and did not give any indication when they might come into compliance.

There was also a deadline set for themselves, by the Bureau of Indian Affairs' witness, of March 30 for all claims to be forwarded from the BIA to the Solicitor's Office, with a deadline of June 30 of this year for the Department of the Interior to send to the Department of Justice all claims.

Mrs. Dinkins, from the Department of Justice, said that all claims—cases—could be filed by December 31, if they were received by June 30.

We have already seen slippage on the March 30 date. In my opinion, the BIA has not forwarded all claims that have been called to its attention to the Solicitor's office. How much slippage is going to be possible from the March 30 date? What will that mean for the June 30 date, and what will that mean for the Department of Justice ability to process these claims?

Once the Department of Justice has whatever claims have been forwarded by the Department of the Interior, then certain decisions will be made, leaving the Indian people little time to prepare cases on their own, for cases that have been determined inappropriate for litigation, or for the Congress to prepare litigation.

In fact, the Congress will not be around at the time the statute runs this time. And, we feel that we definitely need time for claims in many categories, particularly those claims where there are negotiations going on in eastern Indian land claims and water rights claims and fishery damages claims without cases having been filed to this point, and where we would prefer not to file the cases on our own. Also, to provide time for consultation with the affected tribes and Indian individuals. And, certainly, there is time needed, as Delfin Lovato's testimony points out, for the Federal Government to conduct new surveys or resolve the four competing surveys on the Santa Clara Reservation alone. It is difficult to tell what a trespass claim may be if you have four different Federal surveys.

We do need time. I appreciate your remarks about not wanting to extend this statute generally. If we could have a categorical extension, that would not be ideal, but it would be the least that should be done, given your feeling that a general extension is not the way you would like to go. Then, certainly, there are broad categories where we do need extensions of time and I think I have mentioned some. There are many cases the native American rights fund is handling that we have had before the BIA for as long as 2½ and 3 years that have never been accepted into the BIA program as 2415 claims. We have never received acknowledgement of their existence; so, there is some problem with claims not having been identified, even at this late date, even though the BIA is well aware of them, and documentably so.

Alan.

Mr. PARKER. Mr. Chairman, I am appearing on behalf of the Standing Rock Sioux Tribe and we will not purport to say that the Standing Rock Sioux Tribes' situation with respect to 2415 claims is necessarily typical, but the chairman of the tribe, Pat McLauflin felt strong enough about this issue that he asked me to ask the committee for permission to testify, and we will submit a detailed statement within your—as long as you keep the record open for the next week or so—which will identify in more specific terms, the status of unresolved 2415 claims within the Standing Rock Sioux Reservation, but there are a number of points which I discussed with the tribal leader and wanted to make for the record this morning.

The March 30 deadline for forwarding and identifying claims for review by the BIA was clearly totally unrealistic in terms of the situation at Standing Rock Sioux.

They have been operating a rights protection contract under 638 for only the past approximately 12 months. It has been funded at approximately $40,000 to $50,000. That budget has only allowed them to identify in the neighborhood of 1,000 claims which were not identified prior to their contracting for those activities themselves.

They have, as of March 30, identified, and the BIA has recognized approximately 445 claims out of the Standing Rock Sioux Reservation.

The tribal staff feel quite often that there is an additional 1,300 to 1,400 claims. They have just began a successful process of beginning to negotiate and settle some of the outstanding trespass claims that have been identified and recognized by the BIA. Title is not in dispute, it is just a question of negotiating the damages. This process holds real promise out there in terms of defendants, in terms of a very effective resolution of these claims, but that process of negotiation which, if you just consider the number of claims involved, clearly cannot go on under the type of time constraints that we are now looking at.

There are a number of other points that they request that I bring to your attention. The tribe feels quite strongly that there are a significant number of cases where the Government is in a conflict of interest position. The evidence points to some culpability on the part of the Government in terms of how these claims arose in the past and to have the Government in the position of reviewing whether these claims should go forward, or whether these claims should be recommended for prosecution by our Justice Department places the Government, from my clients' point of view, in a conflict of interest position and when they suggest to the Aberdeen area office that there ought to be some funds available for independent counsel to review the Government's actions in this regards, you know, there has been no response.

I think that the administration's request for funds for independent counsel in conflict of interest cases is extremely inadequate and if you want to take that a step further and say, well, are there funds available for any independent counsel in these conflict of interest situations involving 2415 claims, I think it is understandable why the BIA has been responsive to the Standing Rock request. Nevertheless, that does not diminish the fact that if there is a conflict and if the evidence shows that there is a conflict, then it is unconscionable for the Government to be proceeding with these cases themselves without providing some support for independent counsel.

There is another category of claims. The Standing Rock Sioux Reservation has a significant number of allotments where the heirship has fallen to a number of heirs where it is just impossible, as a practical matter, to identify these people.

Now, they have come across a number of situations where the claim has been identified and they are ready to sit down and try to negotiate a settlement, but they cannot contact all of the heirs in order to arrive at, you know, some sort of agreement in terms of the settlement. Under those situations, the superintendent of the agency has taken the position that he has the delegated authority to represent the heirs on these fractionated allotments. The difficulty there is that from the tribes' point of view there ought to be some independent counsel in the manner of a guardian ad litem that would review the actions and the position taken by the Secretary in these settlement negotiations. And, of course, there are no provisions for that at this time.

Finally, the administration has proposed resolution of trespass claims where there is a beneficial right-of-way given and my clients and I will be attempting to work with them to provide more specific detail, but feel quite strongly that, from what we understand was being proposed, is a retroactive ratification of those beneficial rights-of-way on the theory that if the plaintiff has received a benefit from the right-of-way—we're talking about roadways and rights-of-way for power lines, et cetera—then that benefit would, in effect, cancel out the damages. So, the administration's response has been to retroactively ratify that and, in effect, you extinguish the claim that way.

My client's point of view is that the evidence has shown that there are—while there are so-called beneficial aspects of some of these rights-of-way, from their point of view, the damage aspect far outweighs the beneficial aspect and so they have serious questions about this administration proposal and would like to see some inquiries made as to——

Senator COHEN. Well, that is why we have invited the Justice Department here this morning, to find out what the policy is and whether or not you can just take all of these cases en masse and say that benefits have been conferred which outweigh any individual harm that may have come from the trespass. That may be true in some cases, but I do not know that it is necessarily true in all cases.

Mr. PARKER. Right. We just do not know. I mean, in the case of my client, I think they feel that there are a number of cases where clearly the damage aspect outweighs the beneficial aspect.

I will stop at this point, Mr. Chairman. We appreciate the opportunity to testify.

Senator COHEN. Thank you.

Mr. Sampsel.

Ms. Dinkins, perhaps you would join Mr. Sampsel at the table.

Mr. Sampsel, I can understand that there may have been some delays in your arriving here at 9:30, and I have no regrets other than the fact that I wanted you to hear my opening statement and that is because I find the Department's action, or rather inaction, under these circumstances inexcusable.

I wrote to the Secretary of the Interior on September 3 of last year pointing out that they had already missed the deadline at that point.

I wrote again in December of last year, once again, calling attention to the fact that the June 30 deadline had long since passed and still no response. And, I think typical of the kind of reaction I received from this, I got a letter on March 22 to my December letter. So, about 2½ months went by before I even received a response accounting for the inaction. I think that, perhaps, is typical of the way in which we have gone about handling this very important, in my judgment, array of cases. I would really like to hear your opening statement to explain to me why we have waited so long. I know that some of these issues are complex, but time after time, in my correspondence with the Department, I indicated you could have come forward with those that are recognized as being subject to legislative remedies such as the claims against States and for reimbursement of money paid out of trust estates. That could have been submitted to us last year; so, we could have taken some action. What you have done is put us up against a timeframe to which we are not going to be able to respond this year. So, with that in mind, you might proceed.

STATEMENT OF ROY H. SAMPSEL, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.; ACCOMPANIED BY ULYSSES S. ST. ARNOLD AND GUY FRINGER, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Sampsel. Thank you, Mr. Chairman.

I appreciate your opening statement and your comments at this point in the hearing. Let me try to explain what caused the delay of our response to your December letter.

During that particular timeframe, the decisions on which claims were to be administratively handled, those which would require no action because of beneficial use, et cetera, were contained in a decision document which was being reviewed within the Department. Looking back, I can see that it would have been better to have sent a letter describing the decisionmaking process rather than simply not replying. Perhaps it was bad judgment not to have done so.

It was not until, I believe, February 11 that we moved the decision package through to the Secretary for his final decision.

Then, we had a review of that document and our response was sent some 30 days later.

Senator Cohen. Do you think it would be responsible if the Secretary of the Interior were to call or write to me and say, Senator Cohen, we have got a serious matter here we think requires the response of Congress that I would wait 2½ months before getting to him saying, well, we will think about it for 2½ months, Mr. Secretary, and we will get back to you?

Mr. Sampsel. No, I do not think that the Department was responsive and I would not attempt, on the record, to apologize for the delay.

Senator Cohen. All right.

Mr. Sampsel. Mr. Chairman, I will submit my prepared statement for the record, and answer questions that the chairman might have at this time relating to this issue.

Senator Cohen. All right, Mr. Sampsel.

[The statement follows:]

Statement of Roy H. Sampsel, Deputy Assistant Secretary for Indian Affairs (Policy), U.S. Department of the Interior

Mr. Chairman, I am pleased to present a status report on the implementation of Public Law 96-217, which extended the time for commencing actions on behalf of an Indian tribe, band, or group, or on behalf of an individual Indian whose land is held in trust or restricted status.

Public Law 96-217 extended the deadline for bringing tort actions against third parties so that no Indian rights would be irrevocably damaged by the running of this statute of limitations. It authorized the Secretary of the Interior, in cooperation with the Attorney General, to do two things: (1) File all claims against third parties for pre-1966 damages deemed worthy of litigation by December 31, 1982; (2) recommend legislation to resolve those claims which are not appropriate for litigation on or before June 30, 1981.

Since the extension, the Bureau of Indian Affairs has developed a clear picture of the universe of possible statute of limitations claims. This has enabled us to redesign our computer tracking system to monitor the disposition of all claims more accurately. This tracking system contains approximately 17,000 claims, of which approximately 1,200 are still considered active under the Statute of Limitations Program. The remainder have been reviewed and rejected or resolved administratively.

Of the 17,000 a total of 10,212 claims have been considered for legislation. We have thoroughly reviewed these claims and have determined that all but one type of claim are not appropriate for legislative resolution under the Statute of Limitations Program.

The claims considered for legislation can be broken down into the following three categories:

UNAPPROVED RIGHTS-OF-WAY

There are 3,878 unapproved rights-of-way claims, consisting primarily of roads or utility lines. In virtually all these cases, the rights-of-way have been determined to be beneficial with little or no damage to the property. Therefore, we will seek to validate these rights-of-way administratively by requesting the appropriate parties to apply for a right-of-way.

WHITE EARTH, FORCED FEE PATENT, AND OTHER TITLE CLAIMS

Several types of claims involve serious title problems. In these cases, we believe that it is inequitable to seek trespass damages from current occupants who are innocent purchasers. We have also determined that the value of the title aspect of these claims is greater than the damage aspect. The deadline established by Public Law 96-217 does not apply to claims involving title. Therefore, we have decided not to attempt to resolve these title issues within the context of the Statute of Limitations Program.

These title claims consist of the following categories:

1. Saginaw Chippewa Dual Patents in Isabella County, Michigan.—Title problems resulted from the cancellation and subsequent reallotment of 28 fee patents. However, an occupant of one of these parcels was recently able to obtain FHA financing and it appears that this problem can be resolved satisfactorily by individual actions to clear title.

2. Tax Forfeiture Claims.—There are a number of claims associated with Indians' loss of land for failure to pay taxes. The greatest concentration of these cases is on the White Earth Reservation in Minnesota. A 1977 Minnesota Supreme Court Decision *State of Minnesota* v. *Zay Zah* held that these forfeitures were inappropriate. Therefore, current occupants of this land are subject to a serious cloud on their title. The Department will request the Department of Justice to litigate claims for approximately 8,000 acres of land which are now owned by the State of Minnesota or Minnesota county governments. No action will be taken against third parties.

3. Other White Earth Claims.—There are other types of claims on the White Earth Reservation associated with land sales which did not involve tax forfeiture. Unapproved minor sales constitute the major portion of these claims. These sales occurred after the Clapp Amendment made White Earth mixed blood females eligible to sell their allotments at age 18 rather than at the federal age of majority of 21 without Departmental approval.

OLD AGE ASSISTANCE

We plan to present legislation to reimburse those trust estates whose funds were diminished without the consent of the heirs to repay state or county welfare agencies for Old Age Assistance payments, totalling approximately $1.5 million.

The 1,200 claims still in active status are, for the most part, tribal claims involving damage to tribal fisheries or other natural resources, or diversion of water. Most of these claims require extensive research to determine if a tribe has been damaged and the extent of that damage. Evidentiary studies are nearing completion for most of the potential resource claims. There are also several types of claims involving the Pueblos, including land grant boundary disputes, water management practices, and right-of-way disputes.

This concludes my prepared statement. I would be happy to answer any questions you may have.

Senator **Cohen**. Mr. Sampsel. I assume that you are saying that the Department has not complied with the requirements of the law and the recommendations of Congress; is that clear?

Mr. **Sampsel**. We certainly did not meet the timeframes that were set forward.

Senator **Cohen**. Mandated by Congress June 30, 1981. We are now April 1, 1982, and still have not had compliance with that.

Mr. **Sampsel**. We have not complied with the law. I think the record is fairly clear. The reasons are outlined in the statement and perhaps we can clarify them more with additional questions.

Senator **Cohen**. As early as June 9, 1981, the Department of the Interior was advised by the Department of Justice to seek legislative resolutions of the old-age assistance claims and I would like to make part of the record a letter from Carol Dinkins, Assistant Attorney General, Department of Justice to William Coldiron, Solicitor, of the Department of Interior dated June 9, 1981, so advising the Interior Department.

[The letter follows:]

Department of Justice,
Washington, D.C., June 9, 1981.

William Coldiron, Esquire
Solicitor, Department of the Interior,
Washington, D.C.

Dear Mr. Coldiron: This is in response to a letter dated March 23, 1981, from the Deputy Solicitor requesting written determinations specifying those claims or categories of statute of limitation claims which the Attorney General believes are appropriate for resolution by legislation.

The Deputy Solicitor's letter correctly notes that some claims affected by the last extension of the statute, Public Law 96-217, submitted to this Department have been filed and by informal discussion representatives of this Department have advised representatives of your Department that certain categories of claims are appropriate for resolution by legislation.

We have reviewed most of the claims which were referred by your Department. As a result we have concluded that there are some claims which should not be litigated. In some instances we believe there should be no litigation because there appears to be no damage even though there may be a technical trespass. In others we believe that there should be no litigation because the claim results from the action of the government itself.

The first category of claims which we have determined should be resolved legislatively are claims for the recovery of funds paid for old age pensions. Your Department requested we seek to recover funds which it paid to States out of the estates of Indians who had received old age assistance from the States before their deaths. The payments were made in accordance with a Solicitor's opinion and Department of the Interior regulations. A 1962 district court decision held that the Interior regulations were invalid. If the suits were brought, they would seek the refunds for the benefit of heirs of the deceased Indians. These cases actually would involve a multitude of claims, one premised on each estate. The claims for each estate are small. In our view it would be better to provide an administrative mechanism to provide payments to the heirs of the estates, rather than sue the States in complicated litigation where the States did only what the government itself required.

We have also received requests that we sue several rural electric cooperatives for the placement of transmission and distribution lines across tribal or allotted lands on several reservations without obtaining appropriate rights-of-way. It is clear that the placement of the poles, etc., without obtaining a right-of-way is a trespass. The difficulty is that the services provided in these areas are to a large extent beneficial to the Indians and any damages minimal or non-existent. In an action for damages, a local jury, perceiving that the services benefit the Indians, would be unlikely to award any significant damages. We therefore are of the opinion that these claims should not be litigated unless more than nominal damages be shown. Unless your Department can establish significant damages we are of the opinion that any legislation with respect to these claims should be directed to settle the title question.

Our appraisal of the appropriate disposition is the same with respect to requests to initiate actions for trespass due to the placement of state, county, or township roads on tribal or allotted lands without an approved right-of-way. These claims are all located in South Dakota. The existing roads generally provide the only means of access not only to tribal and allotted lands but other lands as well. There is a clear benefit to the tribes or individuals which in most instances offsets by damage. They get roads which are maintained by the local authorities throughout the year at no cost to them since their lands are not taxed. They can get to town or markets. We also note that in most instances, these roads are section line roads and therefore do not greatly impinge on the property or diminish its value. Absent some significant damage to property, we are of the opinion that while technical trespasses exist, the claims for damages are without merit.

Another category of claims referred by your Department involve proposed actions in the form of ejectment to recover allotted lands which were forfeited for failure to pay taxes and for damages for past use of the property. The allotments in this category are all located on the White Earth Reservation in Minnesota. Allotment for mixed bloods on that reservation were the subject of the Clapp Amendment, 34 Stat. 353, which purported to terminate the 25-year trust status of the allottees. Thereafter your Department issued "fee patents" to the allottees before the 25-year trust period had expired. In 1977, the Minnesota Supreme Court held in the case entitled *State of Minesota* v. *Zay Zah*, 259 N.W. 2d. 580 (1977), the amendment did not terminate the trust, and the trust status for the allotments was extended by the Indian Reorganization Act, 25 U.S.C. 462, and that therefore the allottees still have tax exempt status. It held that forfeitures for failure to pay taxes were therefore inappropriate. The proposed defendants in these claims are purchasers who acquired these lands from the state or counties at tax sales. We have determined that to claim damages under these circumstances is inappropriate because it would be inequitable to seek both title and damages. Our experience in similar matters in New Mexico and Idaho indicates that if we are successful in confirming title, damage awards are de minimus. We are taking no action on these cases at this time because we were advised by the Associate Solicitor that discussions are being held with the State of Minnesota to arrive at a settlement of these claims.

We have a request to file a claim for ejectment and damages on behalf of the Indians of the Shoalwater Bay Reservation in Washington. In this case, after the lands were set aside for the Indians, a portion of the lands were repatented to non-Indians. Over the years these lands have been substantially developed. Because the creator of the problem in this instance was the Federal Government itself, and the proposed defendants are entirely innocent purchasers, we believe that this is a situation which could best be resolved by legislation as suggested by former Solicitor Martz in his July 7, 1980, memorandum.

I hope this responds to the matters addressed by Mr. Tidwell in his March 23 letter. If you have any questions, we will be glad to discuss them with you.

Sincerely,

CAROL E. DINKINS,
Assistant Attorney General.

Senator COHEN. The question I have is: Why has the Department failed to make any recommendation to Congress until this time on this category of claims, and when, in fact, can we expect to receive your recommendations?

Mr. SAMPSEL. It was believed at the time that these were being reviewed and that we should complete all of the decisions before submitting our recommendations.

Senator COHEN. Why? Why could not Congress—you know how this institution works, or fails to work, and we have had an example of that in the last couple of days which has not exactly inspired awe and admiration by members of the public for our performance. But, given the fact that we have a number of time limitations on our own institution, why would you wait until this time to come forward with something that seems relatively simple as far as this category of claims, especially since I wrote to the Secretary as of December and said, please send it up. If this is what you intend to do, please send it up so that we can schedule some hearings on it and provide for a bill; work it through the Senate; work it through the House; go to conference and have the measure signed?

Mr. Sampsel. We had a deadline and OMB wanted a complete legislative package to be presented with our recommendations. However, we had not made decisions on how all the claims were going to be handled. Now, again, I recognize the committee's and the chairman's position on it.

Senator Cohen. But, you see what we have done on this situation. You have put us up against a time deadline in which you are going to force a number of tribes to start filing law suits. They are going to interrupt the negotiations going on now and just file lawsuits to protect themselves before the statute runs out and tell OMB how that is going to help out the Department of Treasury. How is that going to help the U.S. Treasury with those kinds of claims then pending at that point? Why could we not have been working during this year on disposing of the area that everybody agrees can be disposed of legislatively, but you want to wait until you get a total package and the time will not be there?

Mr. Sampsel. The decisions were made in that manner and perhaps closer working in consultation with the committee, we would have made them in a different way.

Senator Cohen. How many claims do you put in that category of old age assistance? How many of these have been identified? Which States are affected? What is the approximate value of all these claims?

Mr. Sampsel. I would ask Mr. St. Arnold to give the details.

Mr. St. Arnold. I am Ulysses St. Arnold; I am the Rights Protection Officer for the Bureau of Indian Affairs. I have with me, today, my chief administrator on this particular program, Guy Fringer. He is a historian and he has been working with the statute of limitations project for the Bureau of Indian Affairs for some 3 years now. He is the one who has been compiling our figures, and so on, of all the types of plans and where it is. I think he has a few figures.

Mr. Fringer. Yes. At the present we have listed 1,651 old age assistance claims. They are primarily across what I call the northern tier of reservations from Kansas north and from Minnesota to the Pacific. They are on allotted Indian reservations. Most of them are in the areas I have just described.

Senator Cohen. What is the value of these claims?

Mr. Fringer. Well, we estimate approximately $2.5 million.

Senator Cohen. Is that with or without interest?

Mr. Fringer. That is without interest.

Senator Cohen. Does Interior propose to pay interest on those claims; if you know? The practice was ceased back in 1962 and the Federal District said, "You cannot do that; it is illegal?"

Mr. Fringer. That is right.

Senator Cohen. So, what about interest on those claims?

Mr. Fringer. It was determined that the executive branch cannot pay interest as a rule and it was felt it would be bad precedent for us to award interest on these cases. So, basically what our legislation is now proposing to do is to repay all present-day heirs of the deceased allottees who have claims in excess of $50. We think that claims of less than $50 would not meet the administration's cost-effectiveness goals. They would cost more to process than the amount of repayment would be. But no interest, no.

Senator Cohen. Mr. Sampsel, in your prepared statement you address the category of claims known as rights-of-way claims and you have identified some 3,878 claims involving primarily roads or utility lines with little or no damage to property. And then the Department of Justice in its June 9, 1981, letter concluded the claims had minimal value because a local jury would conclude that the trespasses resulted in a benefit to Indians and would therefore be unlikely to award more than nominal damages.

Now, the Department is going to seek to validate those rights-of-way claims administratively by requesting the appropriate parties to apply for rights-of-way; is that right?

Mr. Sampsel. Yes.

Senator Cohen. Is there a body of law in title XXV of the United States Code that governs application and grants rights-of-way?

Mr. Sampsel. I will have to go to my technical adviser; I am not sure of that.

Mr. Fringer. Our present right-of-way validation processes are listed in 25 CFR, subchapter zero, the whole subchapter deals with roads and utilities; so, we had to list the whole subchapter.

Senator Cohen. How do you go about it now? Suppose you want to put a utility line across somebody else's land, what do you do?

Mr. Fringer. You go out and you ask the person who owns the land if he has any objections to a utility line being put in. If he objects, we do not do it. If he does not object, we do do it, usually with compensation.

Senator Cohen. That is what I am getting at. Usually you have to get two things. No. 1, you have to have consent and, No. 2, you usually have some compensation do you not?

Mr. Fringer. Yes. Now, the compensation can take two forms. It can be an actual money payment or it can be increasing the value of the land by as much as you are damaging it, or more. So, we are not necessarily talking about writing somebody a check.

Senator Cohen. But you might?

Mr. Fringer. Yes, we might.

Senator Cohen. OK. But that is not what is proposed in this particular resolution of these cases? What you have said is: On a wholesale basis, these can be administered administratively and we will simply go back and have these people properly apply for rights-of-way and forget about the trespass damages, right?

Mr. Fringer. No.

Senator Cohen. Mr. Sampsel, is that not what you propose?

Mr. Sampsel. What we have said is that we can validate the rights-of-way administratively——

Senator Cohen. By requesting the appropriate parties——

Mr. Sampsel [continuing]. And the appropriate parties can apply.

Senator Cohen [continuing]. To apply for right-of-way?

Mr. Sampsel. That is right.

Senator Cohen. What does that mean?

Mr. Sampsel. It means that we propose to handle these in an administrative manner as opposed to seeking legislation in another way.

Senator Cohen. That does not answer my question. What I want to know is what does it mean? Does it mean they go back and apply for applications for right-of-way? You might have to consult with the Indians whose property is affected to get permission? And if not permission, because it is already established, would you then talk about analyzing whether they are entitled to compensation? Or, are you just going to say, look, you have got a benefit and forget about being compensated? What are the mechanics?

Mr. **Sampsel.** I am not sure what the individual's recourse would be if we administratively settle this. If they would object on an individual basis; I am not sure what their legal remedy might be beyond this.

Senator **Cohen.** But my problem is: How are they going to know what their rights are? If we drag this out, as we apparently are going to do well beyond December of this year, and you tell us you are going to handle it administratively and then you go through a process and you simply retroactively ratify everything that has been done and say, you have got a benefit and take your pole lines and go home.

What remedy do they have at that point? None. They are precluded by the statute of limitations. They have no recourse through the administrative remedy if they feel they have one. Plus, they have no time in which to even debate the issue.

Mr. **Fringer.** We intend to consult.

Senator **Cohen.** Pardon?

Mr. **Fringer.** We intend to go out and talk to the people who presently own the land that the right-of-way is on. These are somewhat different than approving the right-of-way because obviously the roads are there and there is nothing we can do about that.

Senator **Cohen.** Well, all I am asking is, what is the procedure going to be and when is it going to be done and how much time will remain for those people who disagree with that process? See, if you did it right the first time and simply went through the application; got the consent and agreed on the compensatory aspect, it would not be a problem. We did not do that.

Mr. **Fringer.** That is right.

Senator **Cohen.** Now we are simply saying, go back and ratify it and fellows, you are going to have to take it because you cannot leave it, the roads are there and the utility lines are there, and you have a benefit; so, don't complain about it. That is what we are basically saying; is it not?

Mr. **Fringer.** Yes.

Mr. **St. Arnold.** Yes, that is correct. That is what we are basically saying on it. In some of those cases where we had a utility line or road, it was, I think, in some of these that would be a verbal consent only to go on. Somebody needed a power line; somebody needed a road. They said, "Go ahead, put the road in." In our research we have found that, in fact, it was not a valid right-of-way, which I agree should have been taken care of previously.

What we are proposing to do is go back and see these people and consult with them. We will consult with the individual Indian or allottee or their descendants, whoever it is, that have an interest in the land where either the utility line, a road, whatever is on it, we will be consulting with them and asking them. Naturally, we would have to get their permission to validate the right-of-way on their land in conjunction with either the utility company who has the——

Senator **Cohen**. In other words, you are saying the individuals are going to be treated in the same fashion had we followed the right procedure in the first place?

Mr. **St. Arnold**. Yes, I hope so.

Senator **Cohen**. So that if, in fact, they would have been entitled to compensation under the circumstances that they would be entitled to compensation now?

Mr. **St. Arnold**. In my estimation, yes. I would hope that we would resolve this so that we do not have to go through this same situation again.

Senator **Cohen**. All I am trying to find out is, if we are going to do it on an individual basis? Are we going to do it in blocks saying that all of these cases just simply reapply and we will ratify them as is and everybody received a benefit and we do not have to look at it anymore? I mean, is that not what you are proposing to do?

Mr. **St. Arnold**. No. We still have to go back to individuals on this. In the case of a road in Montana, we have to go back and identify every allotment that the road goes through as well as identifying the heirs and consulting all these people to do it. And it is going to be a tremendous job.

Senator **Cohen**. What is the timeframe?

Mr. **St. Arnold**. Personally, I have no idea of what the timeframe would be on that particular undertaking.

Senator **Cohen**. Now, let me ask you, before we go any further, is not this another case where you could have made this clear last year, so that people could start the process? Why did it take so long to figure out that what we have here is a situation in which we have acted improperly. We have not abided by the law. We are going to try and correct that now and go forward. Why have we waited until April 1, 1982, before telling these people who are affected in this fashion: this is how it is going to be handled? Why have we waited so long?

The truth of the matter is you are not going to have time to go out and visit with every single person affected, are you?

Mr. **St. Arnold**. No. In fact, we are going to have a hard time finding a lot of the heirs.

Senator **Cohen**. Right.

Mr. **Sampsel**. Part of this is just a practical matter of looking at these claims. Talking about the heirs of these allotments. The fractionation that has taken place over the years. I believe there was a trespass case in California in which it was determined that, yes, there was a trespass; there was a violation, and the monetary compensation was $1.

Senator **Cohen**. I am not disagreeing with that, what I am asking you is: These cases have been pending since 19—how long have they been pending, a long time now—and suddenly in April of 1982 you come before the committee that mandated that you come back last year and you say, "Well, here is how we are going to handle it," recognizing that there is not time to handle this volume of cases this way and to do it on a fair basis?

Mr. **St. Arnold**. I believe that if we had known at that time that we had this volume of cases, yes, it would have been the proper time to do it. However, we did not know the total figure at that time. Using contractors, we researched our files, and we kept identifying different claims that had to do with different roads, different people. How many right-of-way cases did we have?

Mr. **Fringer**. About 3,800, I think.

Mr. **St. Arnold**. Well, 3,800. So, we did not know we had the whole 3,800 at that time. We may have had in the neighborhood, say, 2,000; so, we got 1,800 that would be still left to go.

Senator **Cohen**. That is not what I am complaining about.

Mr. **St. Arnold**. And the decision at that time was not made that we would go back and validate; or try to validate those.

Senator **Cohen**. No, I am talking about the procedure. I am not talking about your problem. I understand your problem; that everytime we extend the statute, you have an additional problem because more claims are filed.

What I am complaining about is why has it taken so long to come to a determination of this is the way we are going to handle these cases. We do not know how many there are exactly, but we propose to handle these administratively by simply forcing these people, however many there may be today or tomorrow, to reapply and go through the normal procedure and to ratify that? Now, why has it taken that long to come to this determination as to that process?

That is what I am asking. Not whether you have 3,800; whether you have 4,000 or 2,000. I understand your problem. What I am complaining about is why was it such a difficult decision, to deal with the old-age survivor cases and then with these here before now? This seems like a relatively easy decision to make, saying, "Hey, we can not handle it any other way. We have too many lines out there. There are too many roads and we simply have no practical way of handling this other than the method you now propose?" Why has that taken so long?

Mr. **Sampsel**. I wish I had an answer; I do not know. Perhaps it did not get the proper amount of push or attention that it should have.

Senator **Cohen**. I was pushing for a year.

Mr. **Sampsel**. Well, this is not an apology, but when I arrived here in July, I realized that we had already missed the deadline. And I was not sure why. Then arriving at a decision took longer than anybody thought it would. Maybe a piece of the delay was just a change in administration and the fact that people were not in place.

Senator **Cohen**. Everybody was in place except the top level people. They were all there.

Mr. **Sampsel**. In defense of the Bureau, I think the Bureau was doing its job. I think Sam was working on these cases. I think they were making recommendations. I do not think that the issue was getting the attention that it needed in order to allow a decision to be made on how the cases were going to be handled. That decision was not made at the Secretarial level until February. That does not mean that the work that was necessary to reach that decision was not taking place. The work was in the field.

Senator **Cohen**. Even though it was made at the Secretary's level in February, I did not even get notified until March 22.

Mr. **Sampsel**. That is correct.

Senator **Cohen**. Mr. Sampsel, let us move on to the so-called forced fee claims. Why don't you tell me a little bit about those?

Mr. SAMPSEL. On the forced fee?

Senator COHEN. Yes.

Mr. SAMPSEL. OK. In order to be sure it is explained technically and correctly, I would ask Mr. Fringer to respond to that.

Mr. FRINGER. Forced fee: we sort of put forced fee and White Earth and title claims together; so, I am speaking strictly to forced fee. Between 1915 and 1920, it was the policy of the Bureau to convert land from trust to fee status for Indians that were found competent. After 1917, those who had less than half Indian blood, were already competent. So, they would convert land from trust to fee without consent of the allottees. At that point one of three things happened. Either the land was sold, mortgaged, or tax forfeited. We have pretty much confined ourselves to looking at tax forfeitures because of past legislation which said: "Sale or mortgages is a constructive benefit." But that is basically a conversion from trust to fee without consent. Again, it happened mostly along the northern tier where you had a lot of allotments. We—oh, goodness, how many do we have? I would say we have maybe 30 per area across the northern tier, Minneapolis, Aberdeen, Billings, and Portland; so, we probably have between 100 and 120 that are both tax forfeitures and forced fees. There are over 10,000 that were converted to fee status without the consent of the allottee, but the vast majority were either sold or mortgaged.

Senator COHEN. Now, what do you propose to do about these claims?

Mr. FRINGER. Well, the one thing I want to say on forced fee and beneficial rights-of-way is that one of the fundamentals of the secretarial decision was—as we understand it, and as our solicitor understands it—the statute of limitations does not run against title. It runs against damages and so we have been getting feedback from Justice, for instance—I'm sure Ms. Dinkins will get into this—where they will sue for title. They will not concurrently seek damages in White Earth. So, we felt that for those claims where title was the most desirable thing to get, or to seek, that the statute of limitations did not apply to them and that there were so many of them that they were blocking our workload on cases where there were real damages and less interest in title.

Senator COHEN. In your judgment, is there a cloud on the title now?

Mr. FRINGER. Yes.

Senator COHEN. Now, is that going to be a source of irritation between non-Indian and Indian landowners?

Mr. FRINGER. Yes.

Mr. SAMPSEL. Mr. Chairman, in relation to the largest area, particularly in White Earth, we have been working with a Member of Congress from that particular area, Mr. Stangeland, and are providing at this time a drafting service for legislation to relieve those particular claims. We met also individually with the non-Indians for whom this has been an issue for a long period of time. I am not sure of the Congress' timeframe for introducing the legislation for remedy, but we have a task group now. Coordinating that effort for the Department of Interior is Mr. Ralph Reeser of our staff.

Senator COHEN. Are you saying now that you are proposing a legislative remedy for some of these cases?

Mr. Sampsel. The Congressman has proposed a legislative remedy and we are providing him with the assistance necessary to seek that on behalf of his constituents.

Senator Cohen. Well, let me ask you: Why is he proposing it? Why are you proposing it?

Mr. Sampsel. Because in this particular case, we were looking at the statute of limitations related to damages as opposed to title. The major question in this case is title and the clearing of title, and how that is going to be handled.

Senator Cohen. Are you going to clear title without any award of damages?

Mr. Sampsel. I am not sure. May I ask counsel?

Senator Cohen. Yes, anyone who can tell me.

Mr. Sampsel. Counsel, can you help us?

Ms. Dinkins. Mr. Chairman, we would expect that you would sue to recover the title to the land, but not sue to recover the damages. We have had some instances I believe in other States where we have brought this type of litigation; Idaho and New Mexico, I think, and we have recovered title to the land, but if the courts awarded any damages at all, they were de minimis, just of no import and that is what we would expect in connection with these claims.

Senator Cohen. Then, if no money is involved, why can't you propose legislatively that you bring these actions to quiet title in a legislative package?

Mr. Sampsel. Certainly, I think we could have proposed that, but we did not feel that title was the issue that was more important—the limitation does not run out on the title. So, our concentration was to work on those cases and to try to get a solution in which we had a possible monetary award.

Senator Cohen. What I am getting at, is this is now part of your total comprehensive solution to all these problems; right?

Mr. Sampsel. Yes.

Senator Cohen. Except that is not your recommendation. Your recommendation was not to handle this. Your recommendation was to leave the cloud in the title. What you are really trying to do is work out something with the Congressman from that area and see if you can't handle that over there, but your recommendation does not include, as a general proposition, the resolution of these claims in this way. Your resolution is to do nothing with respect to them.

Mr. Sampsel. Well, in my prepared statement, it says: The Department will request the Department of Justice to litigate claims for approximately 8,000 acres of land which is now owned by the State of Minnesota and the county governments, but no action would be taken against third parties. So, we did not recommend litigation against those third parties. We did not have the legislative package put together, but we are working with the Congressman from that area and with the parties. I have met with the White Earth delegation a number of times, but most recently just about 30 days ago, and I am going up there this weekend.

Senator Cohen. Does that Congressman represent all of the claims outstanding?

Mr. Sampsel. The majority of them are the White Earth claims, and, yes, he does.

Senator **Cohen**. What about the minority of them? Where are they located?

Mr. **Sampsel**. Those other than White Earth, where are they located? Do you have a listing?

Mr. **Fringer**. The forced fee claims and, I think, most of the title claims occur where there was a lot of Indian land and somehow or other the allottees' consent was not obtained for a title status change. That is most of it. And that, again, is in the northern tier reservations. It is pretty evenly divided between Billings and Aberdeen and Portland. Those are the three major areas. And Minneapolis has some as well. But, White Earth is the big one in the Minneapolis area.

Senator **Cohen**. Now, in deliberating on these policy decisions, which the Department is going to adopt this class of claims, did you have option papers developed?

Mr. **Sampsel**. Yes, we did.

Senator **Cohen**. What options were considered by Interior with respect to this category?

Mr. **Fringer**. Of title?

Senator **Cohen**. Yes.

Mr. **Fringer**. There are three basic options. You can litigate, legislate, or solve the problems administratively. We chose the administrative remedy. We made the decision that since title is the paramount aspect of the case, it is not a statute of limitations case. It does not mean we are not going to do anything. What it means is we are going to not do anything in the context of the statute of limitations program.

Mr. **Sampsel**. Mr. Chairman, specifically, the three options that were considered were to recommend no legislation; to recommend legislation extinguishing Indian claims to tax-forfeiture properties and private ownership and vest the U.S. District Court or Court of Claims for jurisdiction to hear Indian claims; and, finally, recommend legislation extending Indian claims from tax-forfeiture properties and private ownership to compensate the heirs through an administrative process. Compensation would probably be based on fair market value.

Senator **Cohen**. Would you have any objection to submitting those for the record?

Mr. **Sampsel**. No, sir.

Senator **Cohen**. The Department of Justice statement indicates that there have been at least two other categories of claims which have not been addressed in your statement, Mr. Sampsel. No. 1, damages arising from the deprivation of water; and, No. 2, damages to tribal fisheries. This latter category would seem to involve some aspect at least of the environmental degradation.

Could the Department give to this committee information which would be necessary to identify the claims with a brief description of the claim itself and its current status?

Mr. **Sampsel**. Yes, we could, and we would be happy to.

Senator **Cohen**. And, also, which claims have been denied by the Department and the reasons for the denial?

Mr. **Sampsel**. Yes.

Senator **Cohen**. I received a letter back in January from Governor Montoya of the Sandia Pueblo indicating that considerable progress had been made in resolution of claims. In fact, I will read it. I think it is important that there has been some local initiative taken and some resolution. I would like to read this to you to tell you what his progress has been.

> Dear Senator Cohen, I am writing to you to express my grave concern over the apparent inability of the Department of Interior to carry out their trust responsibility under Public Law 96-217 to resolve trespass claims.
>
> My tribe is a small Pueblo located on the outskirts of Albuquerque, N. Mex. Our reservation forms a barrier between Albuquerque and the northern half of the State. As you can well imagine, Sandia Pueblo has been involved in a never-ending battle to protect their land from outside encroachment.
>
> During 1979 and 1980, Sandia Pueblo worked closely with the local BIA agency—Southern Pueblos—and the Albuquerque Field Solicitor's Office to identify trespass claims under 24 U.S.C. 2415, the Statute of Limitations. As a result, a total of 105 such claims have been identified. They cover a very large variety of trespasses. Much progress has been made at the local level in resolving these claims.
>
> Of the 105 claims, 20 have been rejected for legal reasons, 30 have been resolved, 3 through litigation brought by the United States on behalf of the tribe and the tribe is negotiating for settlement of 6 of them, and 34 require further work at the local level either by the tribe or DOI officials before they can be resolved. The remaining 15 claims are waiting for decisions in Washington to be made primarily in the Washington Solicitor's Office. Twelve of these claims have been recommended for legislative resolution by the Albuquerque Field Solicitor. Nine of these claims were referred to Washington between the fall of 1979 and the fall of 1980.
>
> The reason we are especially concerned about Washington's inaction on 15 of these claims is that they are the most important ones to our tribe. They involve the appropriation of nearly 1,000 acres of tribal land, patented to the tribe by the U.S. Congress, by non-Indian settlers, public utilities and public roads. Admittedly, these claims involve thorny, legal and political problems, but this is all the more reason to work diligently to resolve them.

The letter goes on to request that we take some action to assist the Solicitor's office in getting a response to those 15 claims. How do you respond to that letter? I guess you have a copy of it in your hand.

Mr. SAMPSEL. Yes, I received one from the Solicitor's office. The questions have not yet been addressed and I have just asked my Solicitor when we might expect a response and he said he thought that it could be handled within 30 days.

Senator COHEN. Tell me how when you process a claim at the local level, is the central office of BIA involved or informed that a claim is pending? Tell me the mechanics of how you identify this?

Mr. SAMPSEL. Would you supply that information, Sam?

Mr. ST. ARNOLD. Usually we work with our area office and the area office works in conjunction with the Solicitor. In our claims' examination process, we went out and actually tried to find claims. We contracted through the area office and, in some cases, with tribes or with legal services and they would come to our area office to review files in conjunction with the Solicitor. Then they would determine whether we had a valid claim at that time, and the decision to either proceed with a claim or to deny a claim was based on the decision and recommendation of the field solicitor. All decisions are not necessarily made in Washington.

Senator COHEN. Well, what I am trying to find out is that testimony by the All Indian Pueblo Council indicates that there are some 1,100 identified claims of trespass to Pueblo lands in New Mexico, and Mr. Sampsel, your statement indicates there are 1,200 claims that are still considered active. How do we reconcile those? Are all the trespass actions in New Mexico?

Mr. SAMPSEL. No.

Mr. ST. ARNOLD. No. These are clear across the board.

Mr. SAMPSEL. I would certainly be willing to work with the All Indian Pueblo Council on this issue. Our records indicate that in the Albuquerque area we have about 600 active claims and that is a discrepancy between, you know, of 500 between what they are saying, and what our figures show. I will certainly work with them since I know that they are in town today.

Senator COHEN. Ms. Dinkins, do you have a statement that you wanted to make?

Ms. DINKINS. Mr. Chairman, my statement is short and I can either submit it or read it, whichever you prefer.

Senator COHEN. Please, read it.

Ms. DINKINS. Thank you.

STATEMENT OF CAROL E. DINKINS, ASSISTANT ATTORNEY GENERAL FOR LAND AND NATURAL RESOURCES, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. DINKINS. As Mr. Sampsel indicated, we have given careful consideration to the legislative and the administrative resolution of claims for damages that would be foreclosed from litigation after December 31 of this year. On that date the time for filing set forth in the statute of limitations in Public Law 96–217 will expire.

The Department of Interior keeps records of claims, but the Justice Department maintains records of cases. The distinction is important since one case may contain thousands of claims. Our records show that Interior has referred about 350 cases that would be precluded from suit after December 31.

So far we have filed 56 cases and we have drafted complaints in 10 others. There is an error in the prepared statement which says, "seven." Three additional have been drafted and those are awaiting approval at the Department of the Interior.

Most of these cases involved trespass, and we generally are seeking to quiet title and seeking damages for the trespass. There have been 15 requests to initiate action for damages as a result of a tribe being deprived of water or damage to a tribal fishery, or a general trespass which we determined were not supported by the evidence or by the law. Additionally, we have received about 25 requests that were incomplete and we have requested additional information from Interior to complete our analysis.

Interior assures us that future referrals will be presented to us well in advance of December 31 so that we will have sufficient time to analyze the cases and determine whether they are appropriate for filing.

The category of claims which Interior recommends, or will recommend be resolved by legislation are claims for recovery of funds paid for old-age pensions. We were requested to seek to recover funds which Interior paid out to States from the estates of Indians who had received old-age assistance from the States prior to their deaths. Those payments were made in accordance with the Solicitor's opinion and with Interior regulations. However, in 1962, a district court decision held the Interior regulations were invalid.

If the suits were brought, they would seek the refunds for the benefit of heirs of the deceased Indians. These cases would involve a multitude of claims, one premised on each estate and the claims for each estate are small.

We believe that legislation authorizing an administrative mechanism provide payments to the heirs of the estates is preferable to suing the States because the States only did what the Federal Government require they do.

Our records show there are five States and there, at best, would have been five cases.

As Mr. Sampsel indicated, Interior will attempt to resolve the other major categories of claims through administration action.

Thank you, Mr. Chairman.

Senator COHEN. Thank you, Ms. Dinkins.

Frankly, I am a little bit concerned about the discrepancy in the way in which Interior and Justice may or may not coordinate their activities. Let me go back to your statement, for example. You indicate that the Interior has forwarded 350 cases to Justice?

Ms. DINKINS. That is correct.

Senator COHEN. Which would be precluded from suit after December 31 of this year. Then, you indicate 56 cases have been filed; 25 returned to Interior for additional information; complaints instituted 10 now, not 7?

Ms. DINKINS. That is correct.

Senator COHEN. That leaves 259 cases unaccounted for.

Ms. DINKINS. Well, we do not have them unaccounted for. About 214 of those are the White Earth cases, or claims that we discussed earlier and there are 8 of them currently in process within the Department of Justice. We are working on drafting the complaints. There are 25 of these which we have recommended for legislative settlement.

Senator COHEN. Where are the rest? You are now down to 225 or 226.

Ms. DINKINS. I believe that we have all of them.

Senator COHEN. You had 259.

Ms. DINKINS. Let me read the list again.

Senator COHEN. Yes, you may.

Ms. DINKINS. Fifty-six filed; 214 White Earth claims.

Senator COHEN. How many, I am sorry, say it again?

Ms. DINKINS. 214 White Earth claims.

Senator COHEN. Yes.

Ms. DINKINS. Twenty-six have been returned to Interior for additional development. Eight are being processed within Justice; 25 have been recommended for legislative settlement; 15 have been rejected and we have 10 in which we have drafted complaints. They are awaiting DOI approval.

Senator COHEN. So, the 214; what recommendation have you made with those, the White Earth claims?

Ms. DINKINS. We are holding on those cases because those are the ones on which Interior is negotiating with the State of Minnesota. The ones that you discussed earlier with Mr. Sampsel.

Senator COHEN. You are in a holding pattern on that until you get word from Interior?

Ms. DINKINS. Yes.

Senator COHEN. Mr. Sampsel, how long do you expect Justice to be in a holding pattern for you to negotiate with Minnesota?

Mr. SAMPSEL. I would certainly hope that we would be in a position to resolve that within another 30 days. If I could, Mr. Chairman, since I do not keep up on this regularly, maybe I could ask Mr. Reeser, who I believe is in the room, how that work is going.

Thank you, Mr. Chairman, for allowing me to consult on this issue. Mr. Reeser says that he expects the work to be completed in less than 30 days and that they have a meeting scheduled next week to do the actual drafting.

Senator COHEN. Now, drafting—just tell me, is there going to be a legislative recommendation?

Mr. SAMPSEL. It will be a legislative package that will be put forward. We are in the process of negotiating to see if that is going to be acceptable. We will get a piece of draft legislation, go out and talk to the folks that are affected, and if it is an acceptable remedy, we will come forward with it. If not, we will tell Justice that we have a problem and that we were not able to negotiate a settlement.

Senator COHEN. Then it will go back to you for your recommendation, right?

Ms. DINKINS. Yes, Mr. Chairman.

Senator COHEN. About what timeframe do you think that is going to be? It is going to be about September, will it not?

Mr. SAMPSEL. I think that we would probably be through with this process by the end of July at the latest. The pressure is on everybody, both from the committee, but certainly——

Senator COHEN. Let me tell you what the pressure is. I am not trying to berate anybody here. We have a serious, serious problem. We have an election year and we will probably try to be out of here by the end of September, maybe October 1, no one is going to be around after that. We have all of these cases pending. You are going to need some kind of legislative action and there is not going to be a legislature here. That is the problem I am concerned about and why I have been, over the past year, trying to say, let's get something going so that we can get a bill started through this session.

If we do not, we are going to find ourselves in a position of running into opposition against general extension of the statute of limitations. Barring that, then you are going to have all these suits, I would think, counsel for the tribes are going to file lawsuits; lawsuits which are going to engender more controversy within their communities, more hostility and, certainly create a bigger problem for us. So, I am not here just to try to find some whipping boys and women; I am trying to find out how we are going to resolve this thing, given the fact that we are not going to be around here much longer. We have a spring break coming up—they are probably already gone. I do not know if anybody else is here today. Then, we have the July recess and then we are going to be out of here the end of—we are going to be gone. So, I just do not know what we are going to do; how we are going to solve these particular issues.

I have a number of other questions, but all I really want to do is to force somebody to come up here and explain what is going on so that I can justify to the other members what we are going to do because I can see the handwriting on the wall. It is not a forgery, as the expression goes. They are going to be back here requesting more extensions and the extensions are going to be hard to come by.

Mr. **Sampsel**. Mr. Chairman, let me take your concerns back to the Department and discuss them with the Secretary and others, and see if, in trying to reach the type of conclusion that the committee has indicated that they want, we can speed up some processes. I will sit down with our folks and see how things are going. I understand that about 95 percent of the field work on the remaining cases has been completed and I will take personal charge to do that investigation with our individual areas and be very specific in terms of the listing, and get that information to the committee very, very quickly.

Senator **Cohen**. Just let me come back to this point. Do you interface with the Justice Department in terms of keeping your records as to how many cases are pending? Which ones are going to be referred to them? Do they have the same records that you do?

Mr. **Sampsel**. I believe so. We may have disagreed on a number once or twice, but at this stage of the game, we are working very closely together. So, I see no problem in that. If Carol's got a problem, she can call me and we will try to fix it and vice versa. We really understand the necessity to get on with the process. My frustration—if I may share it with the Chairman—is that I do not really understand why it takes so long to do things either. As long as I am with the Department and with the Bureau of Indian Affairs, let me assure you that I am going to seek to speed up those timeframes.

Before coming to Washington, D.C., I knew there were some claim cases out there and I read that there was such a thing as statute of limitations, but I had no idea when I took this job that it would be my responsibility, nor that it existed in the magnitude that it did. And the process of getting it cleaned up, I guess, got to be very, very complicated, but it also did not even come close to being responsive to what the Congress had asked for. And that I think is something that is inexcusable. I really respect the way Government is supposed to operate and I think that when Congress tells the executive branch that they need certain things and gives deadlines, the executive branch ought to respond. If not, they ought to say why. We have not had a very clear record of doing that.

This is by no means an apology. If we make a mistake in there, I think we ought to say so and I think Congress ought to know it.

When I came in, Congress had requested about 25 reports from the Bureau. They had not been sent to Congress or even acknowledged. I couldn't believe that was taking place.

I apologize for being part of the situation now, but let me assure the Chairman that we will do everything in our power to make sure that there is no need for an extension. I believe that our people are now on top of it in terms of the timeframe.

Senator **Cohen**. Thank you very much, Mr. Sampsel. As I tried to indicate before, I am not here to lecture anybody. After spending 15 hours of Senatorial debate on an issue as to whether we are going to repeal expense deductions for members of the Senate and the House, I am in no position to come out and lecture you for inefficient expenditure of time.

I am always reminded of that comment made by Bismarck: "If you want to retain your appetite for sausages and laws, you should not be too familiar with how either are made."

So, I do not try to mount this dais and lecture you or anybody else. I know what the inefficiencies are. I have been here almost 10 years now and I can attest to them in volume.

What I am really trying to say is that we have a problem and I do not know what is going to happen if we do not resolve it and if we do not get more expeditious responses from the Interior so that I do not have to wait 2½ months for an answer to a letter, or wait a year, virtually a year, which I think should have been back last year.

Mr. SAMPSEL. Thank you.

Senator COHEN. Thank you very much. I have one more witness. Mr. Delfin Lovato.

Oh, Mr. Sampsel, one other question: we wrote to BIA on March 2 advising BIA that the committee members had requested GAO to example the administration's proposal to reorganize BIA, and we have not received a response on that yet. If you could supply that.

Mr. SAMPSEL. I would be more than happy to. I thought a letter had gone out. However, I will find out the status of the response.[1]

Senator COHEN. Thank you.

Mr. LOVATO. Mr. Chairman, I am going to summarize my statement, but before I do, if the Chair will allow, I would like to introduce several Pueblo governors who are with me here today.

To my left is Gov. Paul Tafoya of Santa Clara Pueblo. To my immediate left is Gov. Bennie Salas of Zia Pueblo. To my right is Gov. Gilbert Pena of Nambe Pueblo. To the far right is Gov. Merle Garcia of Acoma Pueblo.

STATEMENT OF DELFIN LOVATO, CHAIRMAN, ALL INDIAN PUEBLO COUNCIL, ALBUQUERQUE, N. MEX.; ACCOMPANIED BY: GOV. MERLE GARCIA OF ACOMA; GOV. BENNY SALAS OF ZIA; GOV. GILBERT PENA OF NAMBE; AND GOV. PAUL TAFOYA OF SANTA CLARA

Mr. LOVATO. Mr. Chairman, we have a written statement and I believe you have a copy. I would just like to summarize it.

I think the document speaks for itself, Mr. Chairman. We have for the past 3 years made an effort to identify all of the trespass claims within the 19 Pueblo communities. It has been a task that has not been easy considering the history of our State, the Mexican-Spanish land grants. The fact that we have conflicting Government surveys which are responsible to a large part for many of the trespass situations in our State, and also the problem that we have encountered in getting things moving at this level here in Washington.

Needless to say, both the hearings here today and in the House will show that the field work, the work that needs to be done between the BIA and the Indian tribes at the local level is getting done. We have identified in our area approximately 1,100 trespass cases. We have brought these trespass cases to various stages. Some have been resolved. I would say one-third of them have been resolved and the majority of these that have been resolved, including the ones in Sandia Pueblo, that you mentioned, have been largely in part to the efforts of the tribal governments in sitting down with the parties in trespass and to negotiate out trespasses. We have also had some of our cases litigated. These have not fared well. They have primarily been jury cases and the tribes have not fared well for a number of reasons because of the politics in our State and the fact that many of the individuals in trespass on Indian lands on Pueblo lands are political figures. We have had some difficulty.

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[1] Not received at time of printing.

The situation that we find ourselves in, Mr. Chairman, is that we have made an effort in conjunction with the local Bureau people and the Solicitor's office and the Justice Department to put together legislative packages for those claims which we felt would be best resolved in that manner.

These packages have been here in the Solicitor's office as early as June of last year. We have met time and time again with people in the Solicitor's office trying to push these things; trying to get them out of that office; trying to get recommendations to Justice for legislation or litigations. We have all of these cases here to no avail.

I submit to you, Mr. Chairman and members of this committee, that one of our biggest problems is the office of the U.S. Solicitor. The attitude on the part of Mr. Cohlon appears to be the heck with the rights of the Indian people and the Indian tribes. It continues not only in the 2,415 cases we are talking about here, but in other areas. We have at least 400 to 500 of the cases that we have identified within the local level. I am talking about the Solicitor's office. They continue to make recommendations to this central office to no avail.

They are sitting here. We keep being told that someone is looking into them. We have tried every tactic we know of, sir, to get something moving and we can not force these people. We are talking about third-party trespass claims by utility companies, roads, highway departments, and so forth. We are talking about millions of dollars of damages that the tribes have coming to them. We have not even begun to get into the question of the trespasses on the water rights of the Pueblo Tribes.

We have made recommendations in those areas, Mr. Chairman. Again, we have had no response. We have made legislative recommendations on two streams regarding either trespass on the water rights of the Pueblos themselves or because of actions of State agencies there. They have prevented the proper use or irrigation of farm lands by Pueblo people which have caused damages to these tribes.

In one case, the recommendation was rejected by the Solicitor. In another, no action has been taken. We are now faced with another deadline. People can sit up here and say, well, we will do everything we can to meet the deadline. They are not going to do it, Mr. Chairman, and why kid ourselves about it. They are not going to be done with all of the work that needs to be done, and in a manner which is going to do justice to the interests and the rights of the tribes across this country. We are looking for, and we submit and request, at least from our end, that we need to consider an extension. We need to talk about it now. We need to work at it now. We are faced with a situation where we are not, at least from the Pueblo Tribes, not asking for more time to identify more trespasses; we are asking for time to allow us the opportunity to sit down with utility companies or individual trespassers and negotiate out some of these claims. We do not want to load the courts up with more litigation and more expense to the tribes and individuals. We do not want to bring more cases to the Congress and load the Congress with things that we feel we can resolve at the local level.

The problem is that once the deadline gets closer and closer, the utility companies and others have the attitude, well, why negotiate. Let the deadline pass, although they know we are going to file these cases. It is just working to our disadvantage and we need to seriously consider the request that we made here, Mr. Chairman.

I have provided the committee with a detailed report on the status of our trespass claims that have been identified. I do not know what more I can say, Mr. Chairman. It is just that we are in a difficult spot and we need to look at alternatives.

[The prepared statement follows. Testimony resumes on p. 58.]

PREPARED STATEMENT OF DELFIN J. LOVATO, CHAIRMAN, ALL INDIAN PUEBLO COUNCIL

Mr. Chairman and members of the Senate Select Committee on Indian Affairs, my name is Delfin J. Lovato; I am the Chairman of the All Indian Pueblo Council which represents the Pueblo of Tribes of New Mexico comprised of the Pueblos of: Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Picuris, Pojoaque, San Felipe, Sandia, San Ildefonso, Santa Ana, San Juan, Santa Clara, Santo Domingo, Taos, Tesuque and Zia. Thank you for this opportunity to address you today.

I have accompanying me today, Governor Merle Garcia of Acoma; Governor Benny Salas of Zia; Governor Gilbert Pena of Nambe; and Governor Paul Tafoya of Santa Clara.

As the recent testimony of BIA and others before the House Sub-Committee on Judiciary clearly shows, much of the work completed under the Statute of Limitations (28 USC Sect. 2415) has been bogged down in bureaucratic red tape within the U.S. Solicitors Office, the Department of Justice or judicial limbo.

The trespass claims for the Pueblo Tribes are further complicated by conflicting surveys of the U.S. Government, congressional acts, Spanish and Mexican land grants. In addition, this Committee must also consider the serious dilemma in which Pueblo water rights will be placed if immediate actions are not taken by the Committee and the U.S. Solicitor, the Department of Justice, and others.

Over 1,100 claims of trespass to the lands of the Pueblos of New Mexico have been identified and submitted to the Bureau of Indian Affairs. Fifty percent of those claims as of February, 1982 still require additional action before they can be resolved on their merits. Almost 500 of the identified claims still need action by the BIA. According to the Albuquerque Field Solicitor's Office, virtually all of the pending claims are valid. Most of the pending claims involve the Eight Northern Pueblos of Taos, Picuris, San Juan, Santa Clara, San Ildefonso, Pojoaque, Nambe and Tesuque. The information attached as Exhibit 2 indicates that a large number of the Northern Pueblo claims have been resolved by negotiation. The Statute of Limitations contained in 28 U.S.C. Section 2415 has provided significant leverage in negotiating these settlements. Extension of the Statute for an additional three year period will provide enough time to complete negotiations for pending claims involving trespass to Pueblo lands which occurred before 1966. Failure to extend the Statute of Limitations beyond the current December 31, 1982 deadline may well result in litigation which proves unnecessarily costly to both the Pueblos and the non-Indian trespassers.

HISTORY OF THE PUEBLOS

The people of the 19 Pueblos of New Mexico live in agricultural villages, and have done so for many hundreds of years dating back to well before the Europena entry to the North American continent. The Pueblo people enjoyed free use of land and water to meet their present and future needs. Their right to continue their evolution received the protection of first the Spanish, and later the Mexican and United States governments.

When the American army conquered the Mexican frontier province of New Mexico in 1846, the Indian Pueblos of the Rio Grande valley were recognized as organized communities that owned the lands confirmed to them by Spain. Their prior right to use water from available streams to irrigate their irrigable lands was clearly established under Spanish and later Mexican law. After the Treaty of Guadalupe Hidalgo completed Mexico's cession of its northern territories to the United States, Congress proceeded promptly to apply to the Indians of New Mexico its general policies for protection of Indian lands that had evolved from the English practice which in turn had been derived from the Spanish system of protection inaugurated at the end of the 15th Century. See generally *Worcester* v. *Georgia*, 6 Pet. 515 (1838); *Cherokee* v. *Georgia*, 5 Pet. 1 (1831); *Johnson* v. *McIntosh*, 8 Wheat. 543 (1923). Congress made the "Non-Intercourse Act" 4 Stat. 729 (1834) applicable to New Mexico in 1851 (9 Stat. 587), and in 1854 (10 Stat. 308) directed the Surveyor General to examine and validate Spanish and Mexican land grants. In 1858 Congress confirmed the Spanish land grants to the Indian, Pueblos and patent were issued in 1864. See generally *U.S.* v. *Candelaria*, 271 U.S. 432 (1926); *U.S.* v. *Chavez*, 290 U.S. 357 (1933).

Unfortunately, Congress failed to note the development of Territorial enactments (See, for example, Laws 1847, page 35; Laws 1857, page 64) and court decisions (See, for example, *U.S.* v. *Lucero*, 1 N.M. 422 (1869)) that ignored, and eventually subverted, the federal system of trust protection for Pueblo Indian Tribes in New Mexico. Under Territorial Law, Indian Pueblos were treated as corporate entities with full power to alienate their lands, subject to Territorial statutes under which ownership of grant lands was lost after 10 years of adverse possession regardless of color of title after 1899, and regardless of payment of taxes. See *Nambe* v. *Romero*, 10 N.M. 58 (1900). As the population of the Rio Grande Valley increased after the Civil War, encroachment by non-Indians on the confirmed grant lands of the Indian Pueblos increased. Protests by the Pueblos in the Territorial courts invariably failed. By statehood in 1912, most of the Pueblo's best irrigated farmland was held by non-Indians.

In the Enabling Act of 1910, 36 Stat. 557, Congress again stated its intentions that the Indians of New Mexico and their lands, specifically including the Pueblos, remained exclusively under the control of the federal government. The Supreme Court in *U.S.* v. *Sandoval*, 231 U.S. 28 (1913), sustained that action, indicating that the Pueblos had been in wardship from the inception of American sovereignty and that *U.S.* v. *Joseph*, 94 U.S. 614 (1876), had erroneously affirmed territorial decisions to the contrary.

With the *Sandoval* decision, the federal government became aware if the problems created by its failure to protect the Pueblos' federal rights during the Territorial period. It ordered a survey of the lands then claimed by non-Indian within the Pueblo grants. The survey, finished under the direction of Francis Joy in 1917, showed the dimensions of the problem: more than 1500 non-Indians claimed possession of more than 5000 acres of land within the Pueblo grants (Senate Hearings on S. 3865 and 4223, January 15–25, 1923), much of it improved and irrigated, some of it so held for more than a generation.

Congress passed the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, to quiet title to lands within Pueblo Indian land grants. This law required the United States "in its sovereign capacity as guardian" of the Pueblos in the State of New Mexico to quiet titles to land within the exterior boundaries of lands granted or confirmed to the Pueblos by the United States or prior sovereigns. Congress authorized ejectment suits against non-Indian trespassers to Pueblo lands in Section 6 of the Act of May 31, 1933, 48 Stat. 108.

Congress explicitly recognized the prior and paramount rights of the Pueblo Indians to use water, in the Act of March 13, 1928, and in Section 9 of the 1933 Pueblo Lands Act, 48 Stat. 108. Through the years, Congress has authorized payment of money for the operation and maintenance of the Middle Rio Grande Conservancy District, for the use and benefit of Pueblo lands. See, for example, Act of May 29, 1956, 70 Stat. 221; Act of July 27, 1965, Public Law 99-94.

It is against this background of Congressional concern that Pueblo lands be free from encroachments by trespassers, and that the Pueblos' prior and paramount rights to the use of water be fully utilized, that the limitations of actions contained in 28 U.S.C. 2415, currently set at December 31, 1982 for trespass claims arising before 1966, take on added significance. While ejectment and other actions for possession of Pueblo lands will still be maintainable after the end of

1982, by the terms of 28 U.S.C. 2415(c), the Pueblos' ability to collect the substantial value of outstanding trespass damage claims will evaporate unless the deadline is extended.

The Pueblos testified before the Select Committee on Indian Affairs of this body on December 17, 1979 in Washington, D.C. At that time, we believed that an extension of the Statute of Limitations for an additional three years would be adequate to dispose of the many trespass claims involving Pueblo lands. Congress passed Public Law 96–217 extending the deadline for filing such claims to December 31, 1982. Section 2 of that Act required the Administration, on or before June 30, 1981 to submit legislative claims to Congress which the Secretary of Interior or Attorney General believes are not appropriate to resolve by litigation.

Over 1,100 trespass claims involving Pueblo lands have been identified. A summary of the current status of these claims, prepared by the Albuquerque Field Solicitor's Office, is attached to this statement for consideration by the Committee. The All Indian Pueblo Council (AIPC) analyzed the information received from the Solicitor's Office, and further categorized the current status of the trespass claims for each Pueblo. AIPC isolated the number of cases resolved by negotiation, rejected by the United States, approved for litigation by the U.S., and those instances where legislation was the recommended course of action. These figures are grouped into the Eight Northern Pueblos and the 10 Southern Pueblos on Exhibit 2.

The problem of encroachments on lands confirmed to the Pueblos by the Pueblo Lands Boards or purchased thereafter, is most severe among the Northern Pueblos. Over 700 trespass claims have been identified there. Over 400 of these claims are still pending. According to the Albuquerque Field Solicitor's Office, virtually all of the outstanding claims are valid. Of the claims that have been closed, almost 90 percent were resolved by negotiation. Four percent were rejected, one percent went to litigation, and two percent received recommendations for legislative resolution.

An extension of the Statute of Limitations deadline beyond the current expiration date of December 31, 1982 will allow the BIA and Tribes to continue both their negotiation programs to resolve trespass claims and litigation. Though legislative alternatives have been prepared in certain instances, none have been adequately reviewed to initiate legislation.

Many claims were actually caused by variances between the 19th Century patents, Joy Survey of 1917 and the surveys ordered by the Pueblo Lands Act of 1924. Thus, the United States government contributed directly or indirectly to a vast majority of these trespass claims. Administrative resolution, under the threat of litigation, has produced extremely satisfying results in the Northern Pueblos. Extension of the Statute of Limitations deadline would allow this successful strategy to be pursued to its conclusion.

A second major area of trespass claim arises from the unique status of Pueblo Water Rights which have been recognized by Congress as being prior and paramount to all non-Indian users. Act of March 13, 1928; Section 9 Act of May 31, 1933, 48 Stat. 108. The water rights of the Northern Pueblos are currently in litigation and have been for the last 15 years. The water rights for the Southern Pueblos are currently in serious jeopardy because of energy resource development in New Mexico and the operations of the Middle Rio Grande Conservancy District. The Albuquerque Field Solicitor's Office recommended legislative solutions for Pueblo water rights on the Jemez River and the Rio San Jose, as well as the Middle Rio Grande Conservancy District situation. No action on these voluminous reports have been taken by the Washington office of the Solicitor, Section 2, Public Law 96–217 notwithstanding. An extension of the Statute of Limitations will allow Congress and the administration to exhaust this avenue without extinguishing the Pueblos right to sue for trespass damages to this extremely valuable resource.

The operation and maintenance procedures of the Middle Rio Grande Conservancy District (MRGCD) do not adequately recognize and protect the prior and paramount rights of the Pueblos to water. Numerous trespasses to these rights recognized in the 1928 statute, and incorporated in subsequent agreements between the United States and the Middle Rio Grande Conservancy District, the latest of which was executed on March 17, 1980, have been described in a substantial four volume report prepared by the All Indian Pueblo Council and the BIA. The Pueblos of Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia and

Isleta are involved in this continuing claim. The Administration has taken no action on this Field Solicitor's report recommending legislative action. A judicial solution to the problems involving the Pueblos prior and paramount water rights and the Middle Rio Grande Conservancy District appears problematic, in part because the United States Bureau of Reclamation (now and Water and Power Resource Services) operated the MRGCD from 1951 through 1975. Although the Bureau of Reclamation planned to "rehabilitate" the District works during that period, no evaluation has been done, and no final completion documentation of actual work accomplished is available. The Pueblos' problems with poor drainage, water delivery, and bridge maintenance remain. The District chooses to operate several large drains that run through Indian lands as conveyance channels. This practice maintains a high water table, instead of solving the problem; substantial acreage at Sandia and Isleta are unproductive as a result. Water delivery problems arise from buried or unreasonably constricted irrigation ditches. Santa Ana and Sandia are particularly affected by this problem. The absence of bridge maintenance results in isolation of large parcels of useful land for the 6 Pueblos. The responsibility of the Middle Rio Grande Conservancy District for these problems is acknowledged. Satisfactory solutions will require the attention of Congress. Until the Congress has had an opportunity to address this need; the Pueblos submit that the Statute of Lmitations deadline should be extended so that the judicial option remains available.

The Pueblos of Acoma and Laguna in the Rio San Jose watershed and the Pueblos of Jemez, Zia, and Santa Ana in the Jemez River watershed have experienced substantial energy development in recent years. Geothermal development in the Rio Jemez has been a most acute concern of the Pueblos. Uranium mining and municipal development in the Rio San Jose has substantially impaired the amounts and quality of water available to the Pueblos of Acoma and Laguna. The Pueblos sense that their prior and paramount rights are in growing jeopardy from these developments by large corporations. This Administration, however, refuses to either litigate the Pueblos' claims or release legislative recommendations as required by Section 2 of Public Law 96-217. The Albuquerque Field Solicitor's Office recommended feasibility studies for projects in these 2 river basins to store water to sustain at least the historically irrigated acreage of the 5 Pueblos. The Bureau of Indian Affairs has supported Pueblo water development plans. Other water intensive, non-Indian developments have nevertheless occured without consideration of the jeopardy to Pueblo water rights. Until the administrative and legislative avenues have been fully explored, the Pueblos submit that the Statute of Limitations should remain open as a last resort to protect these Pueblos water rights.

The trespass damage claims for these two river systems has been estimated to run as high as 10-20 million dollars, according to the Albuquerque Field Solicitor. The Pueblos involved can derive substantial benefits from trespass damages of this magnitude. The fiduciary duty of the United States in its sovereign capacity as guardian of the Pueblo natural resources requires some action on these legislative proposal before the Statute of Limitation for trespass damages expires. The cost of litigating these water claims is enormous. The burden will fall not only on the Pueblos but also on the thousands of trespassers and private defendants. Therefore, the Pueblos suggest that administrative and legislative solutions need to be fully explored before removing the opportunity for the Pueblos to litigate these trespass claims.

For these reasons, the Pueblos strongly urge this Committee and the Congress of United States to extend the Statute of Limitations for the Pueblo Tribes of New Mexico as set forth in 28 U.S.C. Section 2415.

TRESPASS CLAIMS IDENTIFIED UNDER 28 U.S.C. 2415 FOR PUEBLO LANDS IN NEW MEXICO

[Based on report by Albuquerque Field Solicitor's Office, February 1982]

Pueblo	Trespass claims, total	Pending	Resolved	United States rejected	Litigation approved	Recommended legislation
Southern:						
Acoma	20		1	11	1	3
Cochiti	42		6	2	2	3
Isleta	31		3	3	2	7
Jemez	16		3	8	1	3
Laguna	33		0	15	1	6
Sandia	105		8	40	5	13
San Felipe	18		2	8	0	2
Santa Ana	56		3	35	2	6
Santo Domingo	55		1	23	8	1
Zia	8		0	3	0	1
Total	384	139	30	148	22	45
Northern:						
Nambe	31		1	1	1	0
Picuris	23		5	1	0	0
Pojoaque	133		109	1	0	0
San Ildefonso	61		47	1	0	2
San Juan	128		108	7	0	0
Santa Clara	92		12	0	0	4
Taos	245		6	1	3	1
Tesuque	7		5	1	0	1
Total	720	402	293	13	4	8

FEBRUARY 1982

	Action required			Cases disposed of		
Pueblo or tribe	BIA	Tribe or Pueblo	Solicitor	Resolved/ rejected	Legislative/ Litigation report	Tota
Southern pueblos:						
Acoma	3	1	0	12	4	20
Cochiti	27	4	0	8	3	42
Isleta	14	3	0	5	9	31
Jemez	1	0	1	11	3	16
Laguna	9	1	1	15	7	33
Sandia	22	14	4	48	17	105
San Felipe	3	1	2	10	2	18
Santa Ana	4	2	2	38	9	55
Santo Domingo	11	11	0	24	9	55
Zia	2	0	2	3	1	8
Northern pueblos:						
Nambe	26	0	2	2	1	31
Picuris	17	0	0	6	0	23
Pojoaque	16	0	5	112	0	133
San Ildefonso	9	0	2	48	2	61
San Juan	5	0	8	115	0	128
Santa Clara	76	0	0	12	4	92
Taos	233	0	3	7	2	245
Tesuque	0	0	0	6	1	7
Individual agencies:						
Jicarilla	0	0	0	0	0	0
Mescalero	0	0	0	0	0	0
Ramah	1	0	0	1	0	2
Southern Ute	1	0	0	0	0	1
Ute Mountain Ute	1	0	1	0	0	2
Zuni	0	1	0	0	0	1
Total	481	38	33	483	74	1, 109
		552		557		

Senator COHEN. Mr. Lovato, I think you were here this morning and heard my own expressions of frustration. Certainly the committee has tried for the past year to see if we could not get some response out of the Department of Interior.

Mr. Sampsel, himself, has indicated that there is no excuse. He is not seeking to justify the inaction on the part of the Interior. In his own defense, I would say he came here just a year ago, or less than a year ago, and he is confronted with an enormous problem. I think you have seen his willingness, at least, to try and do something in the future.

I do not know what the reaction will be of my colleagues, but I suspect that we will have to provide some sort of relief because Government has not done what it is supposed to do. We have not measured up to the requirement as mandated by Congress, and that has been through sheer lack of, if not effort, perhaps manpower. Perhaps there is just a shortage of manpower. I do not know. Perhaps there is an attitude that if we wait long enough it will go away, or maybe Congress will extend it again and we will have another 3 years to deal with it. That is not a solution to me either. The more we extend it without any action, it does not really come to a resolution of the problem itself, but maybe through the combined effort of Mr. Sampsel and others that we can work out something so that we do not end up having all these lawsuits filed in order to come under the deadline.

Mr. LOVATO. Mr. Chairman, we intend to proceed in that manner, and I only wish we had more people like Mr. Sampsel in the Bureau who can make some decisions and work with tribal governments to resolve some of these things. I do not know what is going to happen, but we are going to keep trying.

Senator COHEN. Do other members have any statements to make?

Mr. GARCIA. Mr. Chairman, I really do not have too much to say. I am probably in the same situation as Mr. Sampsel, being that I just came into existence as governor of Acoma 3 months ago and I am in this situation here, but the fact is that we are in a situation where the Pueblos are asking for an extension because some of these things have been in there and they are laying around someplace. I realize the fact that when we ask for more time—to get an extension on it, we are making more work for people in Congress and in the Interior Department, but yet there is no alternative. I think this is probably the only way that we could get our needs met and take care of some of trespasses that are already in position.

Thank you.

Senator COHEN. I will have to take it up with counsel, but as I recall, there may be some constitutional problem involved in trying to single out cases that are already identified as being legitimate or at least worthy of consideration and then shutting off any extension for any other claims. You then have a possible challenge under the 14th amendment, as I recall, but that is something I will have to take up with counsel as to whether you can extend it only for a group of cases which are classified as identified and bar any consideration of cases that are not. So, that is one of the dilemmas that we have to operate. I will take that up with counsel.

Yes, sir.

Mr. PENA. Mr. Chairman, I think I speak on behalf of the eight northern Pueblos as their chairman, and I concur fully with what Mr. Lovato has said. I think to burden local governments with an extension simply to identify other trespasses would be very inappropriate. I think we have identified the majority of the major trespasses and this extension that we are asking for is simply to utilize that time for processing and negotiating some of these cases. I think we have had very good luck with some of the parties involved in trespasses in negotiating out of court and arriving at a feasible resolution to the problems.

I would like to thank you for giving us this opportunity, Mr. Chairman.

Senator COHEN. Thank you very much.

Mr. SALAS. Mr. Chairman, I represent the southern governors. I am the chairman of the Southern Governor's Council. I would likewise, like the other men have stated, we are only asking, I think, for a little more time for us to do something that maybe the Department of Justice has not been able to do. I think we have been successful in negotiating some of these cases out. We want to have a little more time to continue negotiations with the people. I think in the long run this would save both sides a considerable amount of money and time.

That is all we are asking.

Senator COHEN. Thank you.

Mr. TAFOYA. Mr. Chairman, I am the governor from the Santa Clara Pueblo tribe. I would like to say these few words. First of all, I would like to point out that we do have a small city built on the Santa Clara Indian Reservation with a population of approximately 14,000. In talking in terms of trespass cases, we have many because of the situation that exists on the reservation with that non-Indian city populating that portion of the reservation.

I do want to point out this one example of why we are seeking an extension. We have been negotiating and we have been very, very successful and because of the situation that exists on our reservation, we need this type of a dialogue between the city government, the county government and the tribal government. The outcome of it will also probably result in that we will provide leases and continue to maintain the good relationship that we are now beginning to establish. I will use four cases as an example. Two went to the district court and we had a jury trial on then. The outcome was that we were awarded, I believe, $400 for two trespass case settlements; whereby, on the other hand, we negotiated out of court and we came out with $70,000. I think that tells us something. We are more successful if we negotiate out of court. At the same time, I feel that we are also improving our relationship and to us that is very important because of the situation that exists on my reservation.

Thank you for the opportunity to speak.

Senator COHEN. Gentlemen, thank you very much for your testimony. The hearing will stand adjourned, but the record will stay open for a period of 1 week in order to complete presentations of the testimony.

[Whereupon, at 11:05 a.m., the hearing was adjourned.]

APPENDIX

ADDITIONAL CORRESPONDENCE RECEIVED FOR THE RECORD

ROBERT J. DOLE, KANS., CHAIRMAN

BOB PACKWOOD, OREG.
WILLIAM V. ROTH, JR., DEL.
JOHN C. DANFORTH, MO.
JOHN H. CHAFEE, R.I.
JOHN HEINZ, PA.
MALCOLM WALLOP, WYO.
DAVID DURENBERGER, MINN.
WILLIAM L. ARMSTRONG, COLO.
STEVEN D. SYMMS, IDAHO
CHARLES E. GRASSLEY, IOWA

RUSSELL B. LONG, LA.
HARRY F. BYRD, JR., VA.
LLOYD BENTSEN, TEX.
SPARK M. MATSUNAGA, HAWAII
DANIEL PATRICK MOYNIHAN, N.Y.
MAX BAUCUS, MONT.
DAVID L. BOREN, OKLA.
BILL BRADLEY, N.J.
GEORGE J. MITCHELL, MAINE

ROBERT E. LIGHTHIZER, CHIEF COUNSEL
MICHAEL STERN, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON FINANCE
WASHINGTON, D.C. 20510

July 14, 1982

Senator William Cohen, Chairman
Select Committee on Indian Affairs
6317 Dirksen Building
Washington, D.C. 20510

Dear Senator:

I am greatly disturbed by the lack of response by the Department of Interior to P.L. 96-217. As you know, this legislation mandated that the Secretary of Interior submit legislative proposals for cases not appropriate for litigation under 28 U.S.C. 2415.

The deadline for the report to Congress was June 30, 1981. This is more than a year overdue. I would be interested in hearing the reaction of the Select Committee on Indian Affairs to this lack of response and the plans of the Committee in this situation. I have enclosed a copy of my letter to Secretary Watt for your review.

Sincerely,

Dave

Dave Durenberger
United States Senator

DD:dj

ENC.

ROBERT J. DOLE, KANS., CHAIRMAN

BOB PACKWOOD, OREG.
WILLIAM V. ROTH, JR., DEL.
JOHN C. DANFORTH, MO.
JOHN H. CHAFEE, R.I.
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MICHAEL STERN, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON FINANCE
WASHINGTON, D.C. 20510

July 14, 1982

The Honorable James Watt
6151 Main Building
C Street between 18th and 19th Streets N.W.
Washington, D.C. 20240

Dear Mr. Secretary:

On March 27, 1980, the 96th Congress passed P.L. 96-217, in conjunction with title 28, section 2415 of the United States Code.

The intent on Congress in this legislation was to end, once and for all, the statute of limitations for commencing action on behalf of an Indian tribe or individual in cases involving money damages on land. In the past, there has been problems getting cases researched and studied. The enactment of P.L 96-217 was not the first time this statute of limitations has been extended, but the intent was for this to be the last. The date was extended from April 1, 1980 to December 31, 1982. This date is once again creeping up on us without any dramatic progress or a solution in sight.

Section 2 of P.L. 96-217 mandated the Secretary of Interior to submit to Congress legislative proposals to resolve the Indian claims that the Attorney General and you believe are not appropriate to solve by litigation. This report was due no later than June 30, 1981. More than a year has passed, and Congress has yet to receive a report from the Department of Interior.

Let me stress that this mandate was not just a suggestion, rather a law passed by Congress and signed by the President. Therefore, this lack of response has been a violation of the law for more than a year.

It would be extremely beneficial for the residents of Minnesota to get this issue resolved. It is essential that this legislation be introduced as soon as possible. I would appreciate a status report on the legislative proposals and the date they will be submitted.

Sincerely,

Dave Durenberger
United States Senator

DD:clj

Claude A. Cox
Principal Chief

George Miller
Second Chief

Muscogee (Creek) Nation
Office of the Principal Chief

April 5, 1982

William S. Cohen, Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D. C. 20210

Dear Senator Cohen:

Please insert the following comment by the Muscogee Nation into the record of the April 1, 1982 Hearing of the Senate Select Committee on Indian Affairs on the subject of oversight of Public Law 93-638.

Two problems have arisen, from the tribal perspective, regarding the implementation of statutory language of the Indian Self-Determination Act:

"SERVICES BENEFITING MORE THAN ONE INDIAN TRIBE" 25 USCA 450b(c)

The Proviso at the end of 25 USCA 450b(c) states:

> Provided, that in any case where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; ...

In areas where Indian tribal areas are significantly removed from each other, there is little problem in delineation of which services are provided to a single tribe, and which services benefit more than one tribe.

However, in areas where tribal areas are contiguous to each other and federal agencies do not use tribal boundaries as service area definitions (such as IHS policy in Oklahoma), the problem becomes complex.

The Muscogee Nation views IHS clinics within the Muscogee Nation as providing services to one Indian tribe. However, IHS views the same clinics as providing services to members of more than one tribe, thus requiring tribal resolutions of consent under the above proviso. The question of whether the proviso means "one Indian tribal government", or "members of one Indian tribe" is therefore a serious definitional problem which should be resolved by legislation.

A recent instance brings this issue into closer perspective: The Chickasaw Nation of Oklahoma has submitted a "638" contract application to perform 'Solar Panel Cleaning' and 'Grounds Maintenance' at the Carl Albert Indian Health Facility in Ada, Oklahoma, and within the exterior boundaries of the Chickasaw Nation. IHS has required that over one dozen tribal governments be contacted for consent resolutions under the above proviso.

Creek Nation Tribal Capitol Complex-Hiway 75 at Loop 56-P.O. Box 580-Okmulgee, Oklahoma 74447-918-756-8700

"RESPONSIBILITIES UNDER THE ACT OF AUGUST 5, 1954, AS AMENDED" 25 USCA 450g(a)

The Secretary of HEW (now HHS) is directed to enter into contracts to carry out any or all of his functions, authorities, and responsibilities under the Act of August 5, 1954, as amended.

In comparison, the Committee's attention is drawn to the fact that the Secretary of the Interior is authorized to enter into a contract for programs or portions thereof provided for in the Act of April 16, 1934, November 2, 1921, "and any Act subsequent thereto." (emphasis supplied).

While the self-determination policy of the United States applies to all new Interior Indian programs after January 4, 1975, it does not apply to new IHS programs created after January 4, 1975.

This has created a problem in the implementation of the Indian Health Care Improvement Act. The IHCIA contracting provisions do not require consultation with tribal governments in the implementation of contracts to Indian organizations.

Within the exterior boundaries of the Muscogee Nation, Cherokee Nation of Oklahoma, and Osage Nation, IHS contracts with Indian organizations for urban Indian health programs within the City of Tulsa. None of the tribal governments are consulted in any way during this process. No requirements are therefore available that the urban program interact with and coordinate activities with the ongoing tribal programs in close proximity to it.

Tulsa is an exception. There is no other urban area in the United States which is trisected by the boundaries of three Indian tribes, and only one other urban area where tribal boundaries include portions of a metropolitan area (the Puyallup tribe in Tacoma, Washington). The urban Indian population in Tulsa is largely from three adjacent tribes; some "urban Indian" families have lived in the area for one hundred fifty years. There is tribal trust land as well as individual inherited and purchased restricted lands within the City of Tulsa.

The Muscogee Nation requests that the Indian Self-Determination Act be made applicable to Urban Indian Health Care (IHCIA) programs located within the exterior boundaries of an Indian tribe.

Sincerely,

Claude a Cox

Claude A. Cox
Principal Chief

LAC COURTE OREILLES TRIBAL GOVERNING BOARD
Pride Of the Ojibwa
Route 2 • Hayward, Wisconsin 54843
[715]634-8934

April 7, 1982

The Honorable William Cohen, Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Congressman Cohen:

The Lac Courte Band of Lake Superior Chippewa Indians wishes to express its view that an extension of the time beyond the due dates now set is necessary for an adequate receipt in processing of claims by tribes against third parties pursuant to 28 U.S.C. § 2415. We are writing in connection with the oversight hearings concerning the Statute of Limitations which were held on April 1, 1982. It is our understanding that the record has been left open for comment to be received.

Our Tribe has currently identified multiple claims, most of which are against the Northern States Power Company, (NSP) and are related to the adverse affects of Project 108, the flooding of tribal and allotted lands within the Lac Courte Oreilles Reservation. The claims, in general, are for: 1) failure to comply with the conditions set forth in the license granted to the Wisconsin-Minnesota Power and Light Company (now NSP); 2) wrongful land acquisition, and 3) claims in trespass. Due to the limited budget we have had to work with, manpower, and thus time, are limited; therefore, these claims have not yet been submitted to the Bureau of Indian Affairs. However, we do expect to submit them within the week, along with a request that we be given an extension of time in order to more fully document and support these claims.

Our initial claims material will include a legal memoranda containing discussion as to liability, and specifically identifying the claims. This memoranda will consist of approximately fifty (50) pages.

We have, in general, identified some of our claims to NSP, and have entered into some negotiations. It appears, however, that the power company is unwilling to reach a settlement of these claims to the extent that it will be necessary to process them through formal claim channels. We do have certain other claims against other parties which we will be needing additional time to perfect.

Our Tribe has been significantly limited in its work in investigating potential claims. We had submitted a proposal involving contract services by our personnel and hired consultants to fully investigate and formulate claims. Our budget was in the amount of $112,316.40. We had received a tentative assurance from Bureau officials that a budget in approximately that amount would be seriously considered. When it came time to finalizing a contract we were told that the original commitment could not be implemented because Bureau monies were being withheld and the Bureau would not receive 50% of its funding until approximately April, 1982. This meant that the additional monies which were being identified for potential use in the project would not be available until after our work was to be completed. The result has been that we have had to utilize half or less than half of the monies that were to be directed to the project, since the other half were not to be available until our work was to be completed and submitted. Obviously, there is no way that under such circumstances the work of identifying claims and fully researching them on both a factual and a legal basis can be completed. It could be argued that such a "catch 22" situation was established in order that claims investigations would not be complete and that tribes would not have the opportunity to fully seek claims to which they would be entitled. The only manner in which the above built-in deficiency can be resolved is to extend the period of time in which claims can be identified and developed.

We have been attempting to fully develop and pursue the potential claims our Tribe might have. However, to do so on less than half the budget with the other monies available only after the work is to have been completed imposes a barrier that cannot be surmounted. I am sure that those who wish to see claims by tribes adequately addressed would be uncomfortable seeing tribal efforts circumscribed by the limitations we have faced.

Thank you for your consideration of our comments.

Very truly yours,

Gordon C. Thayer

Gordon Thayer, Chairman
Lac Courte Oreilles Tribal Governing Board
GH:rf

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Legislative Liaison
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Director
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Main Office
1506 Broadway
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(303) 447-8760

June 21, 1982

The Honorable William S. Cohen
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During the past week, a number of attorneys representing a national cross-section of tribes and individual Indians with claims affected by 28 USC 2415 held meetings with Interior and Justice Department representatives to learn the status of particular claims and to assess the Administration's overall progress in meeting the requirements of P.L. 96-217. This report represents our combined effort and conclusions. It is prepared following meetings with Committee staff for the following purposes: 1) to aid the Committee in its oversight process; 2) to report that Administration progress in processing the claims for monetary damages is insufficient to meet the December 31, 1982 deadline for filing; and 3) to urge that the Committee initiate action to extend the time for filing, and to require specific administrative actions to assure that the extension time is used to full advantage for the intended purpose.

P.L. 96-217 required the United States to file claims before December 31, 1982. Section 2 required the Secretary of the Interior to submit to Congress no later than June 30, 1981, legislative proposals to resolve those claims the Secretary or the Attorney General deemed inappropriate for litigation. The House Judiciary Subcommittee on Administrative Law and Governmental Relations held an oversight hearing on February 17, 1982, followed by your Committee's hearing on April 1.

To date, Congress has received no legislative proposals required by Section 2, despite commitments by Administration witnesses for the records of both oversight hearings that specific legislative proposals would be immediately forthcoming. One such proposal - in the category of old age assistance claims - awaits OMB approval. No other legislation has been drafted by the Departments, although several broad categories of claims and particular claims have been deemed appropriate for legislation by one or both Departments.

Administration witnesses in the oversight hearings stated that some 15,000 claims had been disposed of as litigative matters. Most of these were deemed inappropriate for litigation for policy, economic and/or political reasons, but not for legal reasons. However, no procedure has been established for notifying affected claimants of any actions taken. Of these meritorious claims, most were to have been proposed for legislative resolution, while at least two broad categories - rights of way and forced fee patent claims - were to have been resolved administratively. To date, no administrative plans have been drafted, and the sorting process - between claims that could be resolved administratively and those that should be referred to Justice - has only recently begun in the Bureau of Indian Affairs and the Solicitor's Office. (It should be noted that Justice attorneys have prosecuted one such claim and received a judgment on behalf of an Osage Indian, but all other similar claims remain in Interior.)

Interior representatives informed our group that Secretarial Issue Documents (SIDs) will be circulated for Interior decisions on disposition of a dozen claims or categories of claims. To date, only one SID has been forwarded to the Assistant Secretary for Indian Affairs for possible circulation. Other SIDs are in various stages of initial drafting. The SID process - which involves review, comment and revision by various assistant secretaries, bureau heads and associate solicitors prior to a concluding review by the Solicitor, Assistant Secretary for Policy, Budget and Administration, Under Secretary and Secretary - usually pertains to significant policy matters or actions, and usually takes some 45 days to conclude. Following a SID decision in this instance, OMB will review those matters decided in the SID process to be appropriate for legislative or administrative action.

As of the week of June 14, 1982, only ten cases have been referred by Interior to Justice since the February 17 and April 1 oversight hearings, according to Justice officials. At the time of the oversight hearings, Administration witnesses estimated the number of "active" claims - those beyond the claims proposed for legislative or administrative resolution - at some 1,200. During those hearings, Administration witnesses set two deadlines for processing: March 30, for all claims in the BIA to be referred to the Solicitor; and June 30, for all cases to be referred to Justice. The March 30 deadline was not met, and there is a difference of opinion within Interior as to whether it had been met as of last week. With only days remaining until the June 30 deadline, it should be emphasized that more than 1,100 claims must be referred to Justice. The lead Justice witness testified in the oversight hearings that no extension of time was needed because all claims received by June 30 could be filed within the allowed time. (It should be reemphasized here that June 30 will also mark one year of the Administration's failure to comply with the statutory deadline for legislative reporting.)

To date, the Interior Department has failed to establish an effective centralized information system that accounts for all claims identified throughout the country. As a result, its estimates of the number and types of claims, the time required to develop and assess them and the number that will ultimately be referred to the Justice Department to litigate are inherently inaccurate. The absence of accurate and up-to-date information on the individual claims also makes it most difficult for the Interior and Justice Departments, Congress and the claimants to monitor, or even learn the status of, the Interior Department's progress in meeting its obligations under 28 USC 2415. Any legislation extending the time for filing should require the Secretary of the Interior to submit a plan for Congressional approval that establishes a centralized computer system which will report on a monthly basis the identity of each claimant, a legal description of the property or other interest involved in the claim, the identity of known adverse parties, a description of the claim, the location of the records pertaining to the claim and the status of the claim. The basic information about claimant, property, adverse parties and status would permit claimants, Congress and the Administration to obtain accurate and timely information. This is not possible now under the present system. By including records location in the system, it would be possible to monitor the physical location of the claim as it progresses from BIA and Solicitor's field offices, to Interior offices in D.C. and to the Justice Department. This should help to avoid the situation encountered by claimants where their files simply are misplaced and no action is taken.

Extension legislation should also require the Department of the Interior to report to Congress every three months on the status of claims submitted under the 2415 program, for the purpose of providing Congress with periodic reviews regarding the manner in which the Interior Department has determined to dispose of various categories of claims, as well as the progress the Department is making in meeting the established deadlines. By mandating quarterly reports, last-minute disclosures regarding claims processing problems, and perhaps the problems themselves, should be avoided. Until now, the Interior and Justice Departments have had no responsibility to account regularly to Congress for their actions concerning the Indian damages claims. Lack of specific accountability, and failure to institute an internal accountability system, has undoubtedly contributed to the federal failure to meet its own timelines, to meet statutory deadlines and to process claims expeditiously. Without specific reporting during past extension periods, Congressional oversight hearings have brought little precise information to light, and the general picture of Administration progress has been obscured.

Extension legislation should also require the Secretary of the Interior to submit a plan for Congressional approval that would guarantee timely and adequate notice prior to the expiration of the extended time limits, which would eliminate this problem as a ground for future extensions. In undertaking to evaluate, and in appropriate cases litigate, contract and tort damages actions for Indian individuals and tribes, the United States obviously assumes considerable responsibility for protecting those Indian property interests. To the extent that these actions affect trust lands, the obligation becomes a fiduciary one between trustee and beneficiary. (See CRS Report of November 20, 1979, on the potential liability of the United States should it fail to protect these interests.) It can be said, at the very least, that considerable reliance on the federal government has been induced among Indian claimants, given the ten years that have passed since Indian claims were singled out for special treatment in 28 USC 2415, and the general knowledge that the Interior and Justice Departments have been evaluating and, presumably, preparing to protect these claims, as well as the fact that the federal government is the record-keeper of most information pertinent to evaluating and bringing these actions. Under these circumstances, fundamental fairness and due process require that timely and adequate notice be provided to Indian claimants awaiting some action by the government as to whether a determination has been made by the government not to pursue their claims and as to whether a decision has been made to file a complaint on their behalf. To the extent that the expiration of the time limits will preclude all action on the claim, sufficient time must be allowed, after notice has been given, to permit the claimant to protect the claimant's own interests. The Interior Department acknowledges the existence of this problem, but has not adopted a policy or procedure that assures the provision of timely and adequate notice. Moreover, it is apparent that, under current deadlines, timely notice could not be provided regarding the 17,000 claims that the Department has identified to date.

Along with an extension of time for filing these actions, there should be an extension of time for submitting legislative proposals, but it should be of such duration as to allow Congress and claimants a sufficient time to consider legislation. Section 2 currently provides for Interior and Justice Department proposals to be submitted by the Interior Secretary. Such proposals as exist within the Administration are under review by OMB, which has no reporting requirement. Because of the difficulties Interior, Justice and OMB have encountered in legislative coordination, which have resulted in a lack of compliance with Section 2, the coordinative function and responsibility should be placed in the President, rather than in the Secretary. A separate provision should set a deadline for Interior referral of claims to Justice. In order for the Justice Department to properly evaluate and prepare for litigation those claims that the Interior Department has determined should be litigated, Justice must receive them a sufficient time before the statute runs.

The problems that these suggested legislative provisions address may also be described by specific examples of problems encountered by Indian claimants. One example illustrates that there are substantial claims long known to the BIA which either have not been received and acted upon to date by local or regional BIA and Solicitor's offices or have not been fed into the claims review process at all. Attorneys at California Indian Legal Services report that there are numerous significant trespass claims for unpermitted roads on reservations and rancherias in their area. Several such roads, for example, cross the Round Valley Reservation. The BIA has been aware since at least 1973 that no rights of way were obtained for the roads. After a year and a half of trying to obtain BIA records concerning these highways, the Tribe at Round Valley, in June of 1980, requested BIA assistance in pressing trespass claims, as well as assistance in documenting and evaluating the claims. When the Central California Agency of the BIA refused to provide funds to hire an appraiser, CILS retained someone to prepare a preliminary assessment. That assessment valued the Tribe's claims at more than $1 million. Nevertheless, as of June of 1982, the Interior Solicitor's Office in Washington, D.C., reported that to their knowledge no rights-of-way claims potentially affected by 28 USC 2415 had been referred to them from California.

The plan and tracking system suggested above should also alleviate such problems as that encountered by some heirs to a Nooksack Indian allotment in Washington State. There, several unpermitted county roads cross the land. At least one road has been used repeatedly by unknown trespassers who dump garbage on the property. The claim was submitted to the BIA by legal services attorneys in July of 1979. By the following spring, the regional solicitor was approaching the county with demands for compensation of approximately $120,000. In the fall of 1981, after hearing nothing from the solicitor for months, legal services personnel inquired at the regional level about the claim's status and learned that it had been referred to the Solicitor in Washington, D.C. However, no one responsible for processing claims in either Interior or Justice could or did locate the claim for five months thereafter. Finally, the Interior claims coordinator confirmed, at the end of April of 1982, that the file had been forwarded to Justice months earlier, but had apparently not been assigned for processing, in the belief that it was being handled at the regional level. The regional solicitor, meanwhile, had suspended work, in the belief that responsibility for processing the claims had shifted to Washington, D.C. Justice could locate only a transmittal memo that had accompanied the Solicitor's memo recommending litigation.

The probability of processing and approving for litigation some meritorious claims has apparently been reduced to near zero because of arbitrary funding, personnel and procedural decisions made in Interior. An example is a set of claims for damage to treaty-reserved fisheries in the Northwest. By late 1979, the Solicitor had identified recovery of damages in these instances as a matter of highest priority. For lack of time and personnel to investigate and document other damage causes, BIA and Fish and Wildlife Service personnel were instructed to identify only damage caused by stream barriers. Out of hundreds of such potential claims identified, Interior recommended 30 for litigation and forwarded its request to Justice at the end of 1979. The Solicitor also returned 150 claims to the area office with a request for more information. Much of that information was furnished in March of 1980, when the area solicitor described at least 16 claims worth from several thousand dollars to four and one half million dollars each. The national Solicitor's office then identified 15 streams for which detailed scientific and historical studies were needed to document more fully the damage claims. In September of 1980, the Justice Department acknowledged that a clear cause of action exists in these cases, but said that it could not file suit without further development of evidence touching causation and damages. By spring of 1981, the BIA had contracted with three experts capable of providing the type of documentation desired by Justice. However, funding for these contracts was not sufficient to permit studies of the 15 "high priority" damage situations identified by Interior in 1980. The cases thus prepared for a final litigation decision were far fewer than the 30 first recommended for litigation by Interior.

The Interior Department has failed to investigate, to attempt to resolve and to document the claims of Indians in several parts of the country, including the claims of Ottawa Indians in Michigan for damages arising from derogation of their treaty-reserved fishing rights. In August of 1978, the BIA contracted with a legal services program to identify potential claims for resolution under the 2415 process. The program researched a four-county area for land transfers and determined that at least 86 individual transactions occurred in this limited area. These involve Indians whose lands were taxed and lost at tax sales during a period when the land was subject to a trust responsibility of the United States, which should have prohibited taxation. Much of this land had bay access; loss of this access precluded utilization of the fishery, the primary historical enterprise of these Ottawa Indians. Although these claims were identified and forwarded to the BIA Michigan Agency - and the BIA stated that it was "assuming full accountability in the future and will provide services, personnel and funding of our own for the Ottawa 2415 claims" - no claims have been forwarded for litigation, nor has any legislative proposal been advanced or drafted to resolve these and other similar claims.

Many other examples of arbitrary and careless Administration practices in this area could be furnished, and several other specific instances have been discussed in the oversight hearings and otherwise called to the Committee's attention. The examples highlight such problems as failure to notify Indians of actions and decisions affecting their property interests, inconsistencies in methods of recording and counting claims, requirements that the Indians provide detailed documentation of injuries which the BIA is better able to document, repeated shuttling of claims between various federal offices and departments, refusals to provide information relevant to the claims' merits to potential claimants and disregard of administrative timelines paired with penalizing of claimants because of federal failure to meet such administrative and statutory deadlines. Other examples demonstrate that numerous claims are being rejected as non-meritorious when federal evaluators find that past federal actions or inactions were largely responsible for third party violations, while other examples illustrate that numerous claims' resolutions are being approached in terms of validating the violation, rather than fairly compensating the injured claimant.

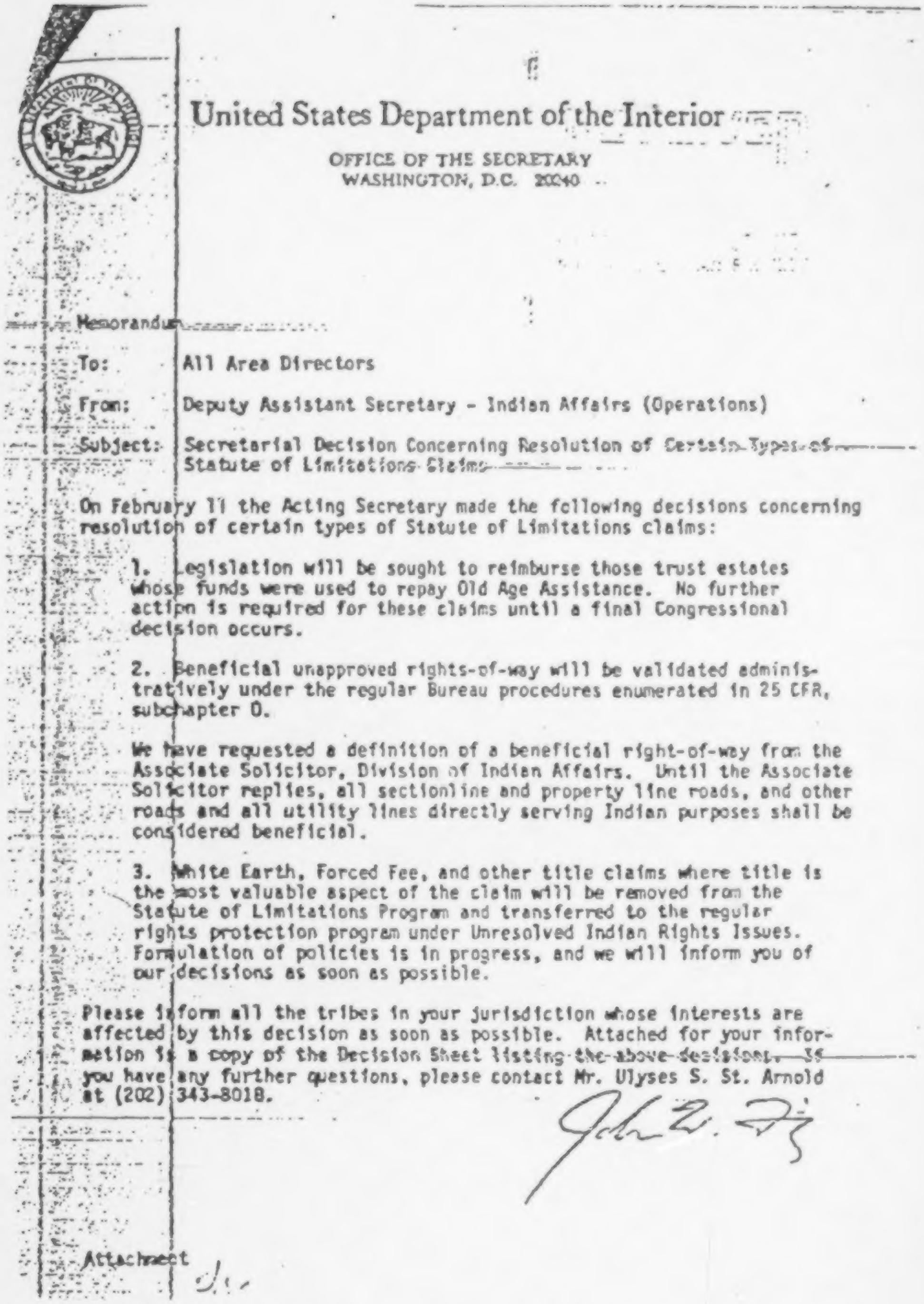
Our experience with the Administration's efforts to meet the Section 2 and filing deadlines lead us to conclude that, unless the time for filing is extended, the United States will be exposed to numerous suits for failure to file claims on behalf of Indians in timely fashion, and for rejecting meritorious claims arbitrarily. Unless the time is extended, many tribes and individual Indians will be penalized for this federal failure.

Thank you for your expeditious review and consideration of this request for legislative action.

Sincerely,

Suzan Shown Harjo

Suzan Shown Harjo
Legislative Liaison



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Memorandum

To: All Area Directors

From: Deputy Assistant Secretary - Indian Affairs (Operations)

Subject: Secretarial Decision Concerning Resolution of Certain Types of Statute of Limitations Claims

On February 11 the Acting Secretary made the following decisions concerning resolution of certain types of Statute of Limitations claims:

1. Legislation will be sought to reimburse those trust estates whose funds were used to repay Old Age Assistance. No further action is required for these claims until a final Congressional decision occurs.

2. Beneficial unapproved rights-of-way will be validated administratively under the regular Bureau procedures enumerated in 25 CFR, subchapter O.

We have requested a definition of a beneficial right-of-way from the Associate Solicitor, Division of Indian Affairs. Until the Associate Solicitor replies, all sectionline and property line roads, and other roads and all utility lines directly serving Indian purposes shall be considered beneficial.

3. White Earth, Forced Fee, and other title claims where title is the most valuable aspect of the claim will be removed from the Statute of Limitations Program and transferred to the regular rights protection program under Unresolved Indian Rights Issues. Formulation of policies is in progress, and we will inform you of our decisions as soon as possible.

Please inform all the tribes in your jurisdiction whose interests are affected by this decision as soon as possible. Attached for your information is a copy of the Decision Sheet listing the above decisions. If you have any further questions, please contact Mr. Ulyses S. St. Arnold at (202) 343-8018.

Attachment

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MEMORANDUM

To: All Regional and Field Solicitors

From: fr Solicitor Jean Kingery

Subject: Rights-of-Way Damage Claims subject to the December 31, 1982 Statute of Limitations in 28 U.S.C. § 2415

The purpose of this memorandum is to provide you with guidelines for determining if your pending unapproved rights-of-way claims on behalf of Indian tribes and individual Indians warrant requests for litigation to recover pre-1966 trespass damages. Such trespass damage claims will, of course, be barred if not filed by December 31, 1982, 28 U.S.C. § 2415(b).

Background

On June 9, 1981, the Assistant Attorney General for Land and Natural Resources informed this Department that no ejectment and trespass damage actions would be filed for unapproved section line road and electrical utility line rights-of-way claims which had been submitted to the Justice Department by the Aberdeen Field Solicitor. (Letter attached) While the Assistant Attorney General acknowledged that technical trespasses exist, she concluded that the claims for damages are without merit where the rights-of-way confer benefits to the Indian property which completely or substantially off-set the trespass damages.

A recent decision by the United States District Court for the Southern District of California confirms this conclusion. In United States v. County of San Diego, Civil No. 80-0332 (U.S.D.C. S.D. Cal. April 8, 1981), the United States, on behalf of the Mesa Grande Indians, sued the County of San Diego for injunctive and monetary relief alleging that the County had constructed a road across the Mesa Grande Reservation without an approved right-of-way pursuant to 25 U.S.C. § 311. Because there was no record of a right-of-way having ever been granted, the District Court permanently enjoined San Diego County from continuing its road trespass. The District Court, however, found that the county road in trespass conferred a benefit on the reservation land by providing a means of access to and from the reservation; any trespass damages were off-set by the benefits conferred by San Diego County in constructing and maintaining the road. The Court awarded one dollar in damages.

Guidelines

It is my understanding that a substantial number of unapproved rights-of-way claims which are subject to the December 31, 1982, deadline are still under review either at the BIA Agency or Area Office or the Field or Regional Solicitor's Office. To assist you in reviewing your remaining rights-of-way trespass damage claims the following guidelines have been developed.

Litigation to recover pre-1966 damages for unapproved rights-of-way should not be requested if there is no evidence of significant damages. For example:

> (1) Beneficial effect of the right-of-way. The facts indicate that the right-of-way benefits the remaining tract of land by increasing its real value or by providing a service, such as electricity, or in the case of a road, by providing the only practical or substantially improved means of access to and from the nearest community or major road or highway, and the benefit conferred by the right-of-way appears to completely or substantially off-set the damages for the land taken and any severance damages to the remaining tract; or
>
> (2) Minimal or no adverse effect on the use of the Indian land. There is no evidence that the right-of-way location greatly impinges upon or adversely affects the overall use of the entire tract or diminishes its real value, such as a section line road; or
>
> (3) No valuable resources damaged or removed. There is no evidence that significant amounts of merchantable timber, gravel, or other valuable resources were removed from the property or destroyed as a result of the trespass; or
>
> (4) No flagrant trespass. There is no evidence that the trespass upon Indian land, such as constructing and maintaining a road, was accomplished over the objections of the Indian landowners or the United States.

You are instructed to review all pending pre-1966 rights-of-way claims in accordance with these guidelines. All unapproved rights-of-way claims which do not warrant litigation should be returned to the Bureau of Indian Affairs. On March 10, 1982, the Deputy Assistant Secretary - Indian Affairs (Operations) advised all Area Directors that right-of-way claims which would not be litigated should be validated administratively pursuant to 25 CFR Sub-Chapter O (memorandum attached). If you have any questions concerning this memorandum, please call Michael Cox (FTS 343-9331).

2 Attachments

United States Department of the Interior
OFFICE OF THE SOLICITOR
ROOM 211 - FEDERAL BUILDING
P.O. BOX 549
ABERDEEN, SOUTH DAKOTA 57401

April 8, 1982

Memorandum:

To: Area Director, Bureau of Indian Affairs
Refer: Rights Protection

From: Field Solicitor

Re: "2415 Claims", Rights-of-Way Damage Claims Subject to the December 31, 1982, Statute of Limitations in 28 U.S.C. §2415

Please find attached the April 2, 1982, Solicitor's memorandum on the above subject. The guidelines set forth are rather clear. You may note the referenced instruction by Deputy Assistant Secretary, Indian Affairs, to administratively validate proper right-of-ways (those not like the four examples on page 2 of the Solicitor's memorandum). This office stands ready to assist and advise you in your efforts.

If you have questions or comments, please advise.

Roger W. Thomas
For the Field Solicitor

Enclosure

cc: Regional Solicitor

UNITED STATES GOVERNMENT
# memorandum

2-RIP-90

DATE: April 14, 1982

REPLY TO ATTN OF: Rights Protection, Aberdeen

SUBJECT: "2415 Claims", Rights-of-way Damage Claims Subject to the Statute of Limitations.

TO: All Superintendents, Aberdeen Area/
Field Solicitor, Aberdeen, South Dakota

The attached memoranda is sent for your information on what can be considered as being a "beneficial" right-of-way, and perhaps would not be filed for litigation. Please share this information with your 2415 Claims Coordinator. You are advised that these determinations do not cover those rights-of-way which cross an allotment at an angle as to cause a severance which can be construed as a damage rather than a benefit.

You are further advised that the section line roads and the approval of an easement should be addressed after the current deadline of December 31, 1982.

If we can be of further assistance, please advise.

Assistant Area Director
Natural Resources

RECEIVED
APR 16 1982
FT. TOTTEN AGENCY
FT. TOTTEN, N. DAKOTA

Attachments: 2

cc: Tribal Chairman, Cheyenne River Agency, Crow Creek Agency, Lower Brule Agency,
Tribal Chairman, Yankton Agency, Sisseton Agency, Fort Berthold Agency,
Tribal Chairman, Fort Totten Agency, Turtle Mountain Agency,
Tribal Chairman, Standing Rock Agency, Winnebago Agency (3)
Tribal President, Pine Ridge Agency, Rosebud Agency, Flandreau Field Office
638 Contractors
Administrative Clerk, Flandreau Field Office

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

*U.S. Government Printing Office: 1980—311-153/8017

ACTIVE STATUTE OF LIMITATIONS CLAIM BY TYPE

TYPE	COUNT
Breach of contract	30
Unpaid lease or rentals, etc.	33
1 Monies appropriated for old age assistance	1651
NATURAL RESOURCES CLAIMS	
Wrongful water appropriation	31
Damage to fisheries	228
Wrongful depletion of game reserves	2
Damage to natural food	3
Damage to water quality	7
Removal of minerals, fill, oil or gas	27
Removal of fish or other natural growth	7
Removal of timber	24
Wrongful tax on natural resources	3
Wrongful tax on trust land	4
TITLE CLAIMS	
* Tidelands, accretion and reliction disputes	18
* Questionable cancellation of title	203
* Forced fee patents	2762
* Improper mortgage foreclosure	24
* Improper designation of trust lands	22
* Lands not relinquished on reverter or abandonment	11
* Restricted lands sold without approval	516
* Secretarial transfer without approval	781
* Tax forfeiture	256
* Court distributed without jurisdiction	90
TRESPASS CLAIMS	
Agricultural	52
Building or structural	86
Wrongful dumping	14
Boundary encroachment	255
Grazing	23
Water	17
* Beneficial road right of way	357
Damaging road right of way	314
* Beneficial ditch right of way	6
Damaging ditch right of way	16
* Beneficial utility right of way	3515
Damaging utility right of way	115
Railroad trespass	20
	11,523

* Rejected as of February 11, 1982

1 Legislative proposal forthcoming

DISPOSITION OF STATUTE OF LIMITATIONS CLAIMS

17,000 claims		
	498	resolved administratively
	5,151	rejected as of Feb. 5, 1982
	8,561	rejected as of Feb. 11, 1982
	14,210	-- subtotal rejected or resolved
	1,651	Old age assistance claims (Legislation will be asked)
15,861	15,861	-- subtotal
1,139		- No present decision

NORTH DAKOTA
LEGAL SERVICES, INC.

JAMES P. FITZSIMMONS
Director

Post Office Box 217
New Town, ND 58763
PHONE 627-4719

JAY B. PETERSEN
Staff Attorney

. . .

JOY L. BURR
Administrative Assist

. . .

SHAROL K. JOHNSON
Legal Assist

. .

VICTORIA DICKENS
Community Ed. Coordinator

SERVING THE COUNTIES
OF:
Mountrail
McLean
Mercer
Dunn
McKenzie
and
Fort Berthold
Indian Reservation

July 8, 1982

Honorable William S. Cohen
United States Senate
Select Committee on Indian Affairs
Washington, D.C. 20510

Dear Senator Cohen:

I am sure that you are aware of some of the potential problems that are surfacing as a result of the Department of Interior's inaction on a great number of 28 U.S.C. 2415 Indian Land Claims. Because of the legislatively imposed deadline on these Claims and the Department of Interior's lack of action, a great many 2415 Claims will be forever extinguished unless the Congress extends the deadline and mandates the Department of Interior to process these Claims.

North Dakota Legal Services researched BIA identified Claims under a three (3) month summer subcontract back in 1979. Our research coordinator Barbara Lindley and I agreed back then that there remained a great many other 2415 Claims that needed to be identified and researched. In checking with area offices and personnel, I find that most of this research and identification has still not been done, particularly in the area of forced fee patents and right-of-way Claims. In checking with Cynthia Davenport, of Evergreen Legal Services in Oregon, and others I understand that the same situation exists throughout the country.

I strongly urge you to do what you can to extend the legislatively imposed deadline on 2415 Claims. Thank you for your time.

Sincerely,

James P. Fitzsimmons
JAMES P. FITZSIMMONS

JPF/vid

IDAHO LEGAL AID SERVICES, INC.
INDIAN LAW UNIT
410 Sherman, Suite 303
P.O. Box 1439
Coeur d'Alene, Idaho 83814
(208) 667-9559

July 14, 1982

RECEIVED JUL 22 1982

Michael Cox, Esq.
Office of the Solicitor
United States Department
 of the Interior
Washington, D. C. 20040

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: 28 U.S.C. § 2415 Claims Program

Dear Mr. Cox:

As one of the attorneys meeting with Suzan Harjo in Washington, D. C., I had the opportunity of participating in the June 15, 1982 meeting held at the Interior Department between lawyers from Montana, California, Washington and Michigan and members of the staff from Interior working on the Claims Program.

At that meeting the impression was given by Interior staff that criteria were being developed to be utilized in determining which of the 2000 forced fee patent claims identified nationwide will be affected by the announcement in the March 1982 Memorandum from John Fritz. In that Memorandum Mr. Fritz indicated that forced fee patent claims, where title is the most valuable aspect of the claim, would be removed from the 2415 Claims Program and placed in the Unresolved Rights Protection category, evidently to be dealt with locally as time and resources permit.

The criteria being developed were to be placed in a "memo", authored by yourself or Tim Vollman, for utilization in the Claims Program. It was unclear whether this memo would attain the status of a Secretarial Issue Document (SID).

My present concern is with the development of these criteria and the ramifications thereof for numerous forced fee patent claims filed by my office on behalf of the Coeur d'Alene

Tribe and heirs of the allottees. A June 3, 1982 computer printout from the Portland Area Office, BIA, indicates that twenty-three (23) of the claims filed for the Tribe are still "active" (AC), with twenty-two of them (22) at the Central Office of the Solicitor (SC) and one at the Department of Justice (DJ). (A copy of these claims is attached for your convenience.) For your information, these twenty-three claims held the exact same status in August of 1981. Evidently, no progress has been made with respect to the individual merits of these claims over the past eleven months.

As time passes and December 31, 1982 quickly approaches, I believe that it is particularly disturbing that neither my office nor the Coeur d'Alene Tribe have ever been notified of the progression of these claims through the Program. Are heirs of allottees, and the Tribe in their behalf, to sit idly by while the statute of limitation lapses and potentially valuable damage claims are lost due to government inaction? Does the government propose to cure one injustice with another?

On behalf of the Coeur d'Alene Tribe and heirs of allottees upon whom fee patents were forced, I request that your office provide information with respect to the current status of the attached list of claims, and whether these claims will be removed from the Claims Program following development of the memo and criteria contained therein. I also request a copy of the memo referred to herein, as well as any other relevant documents upon which the decision to remove forced fee claims from the Program will be made. These requests are made pursuant to 5 U.S.C. § 552.

Very truly yours,

IDAHO LEGAL AID SERVICES, INC.
Indian Law Unit

Steven C. Moore
Attorney at Law

SCM:ew
Enclosure
cc: Coeur d'Alene Tribe
Attn: Chairman Matheson

Hon. William S. Cohen

The Saginaw Chippewa Indian Tribe, Inc.

7070 EAST BROADWAY MT. PLEASANT, MICHIGAN 48858 (517) 772-5700

July 23, 1982

The Honorable William S. Cohen
Chairman
Select Committee on Indian Affairs
United States Senate
Washington D.C. 20510

Dear Mr. Chairman:

Enclosed is Resolution AD-05-82, passed by the Saginaw Chippewa Tribal Council on July 12, 1982. This purpose of this resolution is to display our Tribe dismay in the way in which claims under 28 U.S.C Section 2415 are handled after they have been filed. Somewhere in the shuffle to expedite these claims, the salient fact that rights are be addressed is being lost, or forgotten.

We would like to request that this resolution entered into the records of the Select Committee. We appreciate your consideration in this matter.

Sincerely yours

Arnold J. Sowmick
Tribal Chairman

Enclosures
AJS/sad

The Saginaw Chippewa Indian Tribe, Inc.
7070 EAST BROADWAY MT PLEASANT, MICHIGAN 48858 (517) 772-5700

RESOLUTION

WHEREAS: The Saginaw Chippewa Indian Tribe of the Isabella Indian Reservation in Michigan is a federally recognized Indian Tribe under a consitution and by-laws ratified by the Tribe on March 27, 1937, and approved by the Secretary of Interior on May 6, 1937 pursuant to the appropriate provisions of [illegible] Indian Reorganization Act of June 18, 1934 (48 Stat. 984) as amended by the Act of June 15, 1935 (49 Stat. 378) and;

WHEREAS: The Saginaw Indian Tribe is a federal corporation chartered under the Act of June 18, 1934 (48 Stat. 984) and;

WHEREAS: The Saginaw Chippewa Tribe is remnant of the Saginaw, Swan Creek and Black River Bands of Chippewa, signatories of Treaties of 1855 (11 Stat. 633) and 1864 (14 Stat. 657) and;

WHEREAS: Said Treaties provided for allotments of land and;

WHEREAS: Some of these allotments being of the not-so-competent variety and;

WHEREAS: The Secretary of Interior cancelled 105 fee patent in the years 1872 and 1874 and;

WHEREAS: After these patents were cancelled approximately 28 patents for forty acre allotments were issued to people of not-so-competent status and;

WHEREAS: It was decided in United States V. Naw-cum--o-quay, et al in 1925 that the secretary of Interior did not have the power to cancel fee patents in 1872 and 1874 and;

WHEREAS: Therefore the second allottees did not have any interest in the land and;

RESOLUTION
Page Two
July 21, 1982

WHEREAS: Commissioner John Collier ordered an investigation on May 31, 1933 and nothing was done and;

WHEREAS: In 1979 to 1982 in depth research was conducted on this issue under 28 U.S.C. Section 2415 and;

WHEREAS: There was precedence for legislative resolution of this issue based congressional action following the 1925 case and;

WHEREAS: We have been notified that the Secretary of Interior has decided not to request congressional action on this issue and;

NOW THEREFORE BE IT RESOLVED: That the Saginaw Chippewa Tribe vehemently protests the failure of the Department of Interior to act on this problem that is 110 years old, in which 28 individuals failed to receive their Treaty entitlement.

AND BE IT FURTHER RESOLVED: That the Saginaw Chippewa Tribe protests the overall lack of action by the Interior Department and Department of Justice in enforcing the law, by failing to adequately pursue claims under 28 U.S.C. Section 2415 and the Tribe strongly supports and extention of the present statute of limitations.

CERTIFICATION

The foregoing resolution was duly adopted by the Saginaw Chippewa Indian Tribe of the Isabella Reservation with a quorum being present during a ([✓ regular], special) meeting on the 12th day of July 19, 82, by a vote of 10 for 0 0, against, and 0 abstaining.

Arnold J. Sowmick, Tribal Chairman

Lorna Kahgegab Call
Lorna Call, Tribal Secretary